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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 139.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MICHIGAN.

FILED JULY 26, 1901.

(18,232.)

16297

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JUNE 26, 1902.

1 Supreme Court.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY
vs.
CHASE S. OSBORN, Commissioner of Railroads.

RECORD.

Petition.

To the honorable the justices of the supreme court of the State of Michigan:

The petition of the Detroit, Fort Wayne & Belle Isle railway, a corporation, organized and existing under and by virtue of the laws of the State of Michigan, respectfully shows:

1. That your petitioner is a street railway corporation, organized as such under and by virtue of the provisions of chapter 95, Howell's Annotated Statutes of Michigan, providing for the incorporation of street railway companies, and is now, and has been since its incorporation, engaged in maintaining and operating an electric street railway system in and through the city of Detroit, as hereinafter more particularly set forth.

2. That the Fort Street & Elmwood Avenue railway was a corporation organized under and by virtue of chapter 94, of Howell's Annotated Statutes of Michigan, in February, 1865, for the purpose of constructing and operating a street railway through the streets in the city of Detroit. That said act of the legislature under which said Fort Street & Elmwood Avenue railway was organized, was subject to amendment, and was subsequently amended by an act of the legislature; which said amendment now constitutes section 3527 of Howell's Annotated Statutes. That by virtue of an ordinance duly passed by the common council of the city of Detroit, January 31st, 1865, Frederic Buhl, John P. Clark and Eber B. Ward, their associates, successors and assigns, were given consent, permission and authority to lay a single or double track railway, with
2 all the necessary and convenient tracks for turnouts, side tracks and switches along, and upon certain of the streets of the city of Detroit, commencing at the westerly limits of the city of Detroit, as then existing, where Fort street intersected said westerly limits—thence easterly through Fort street to Woodward avenue, and upon certain other streets in said city. Said grant, and the powers, rights and privileges conferred thereunder, were to extend and continue for a period of thirty years from the date of the passage of said ordinance. That thereafter all the rights, powers and privileges granted by said ordinance to said Frederick Buhl, John P. Clark and Eber B. Ward aforesaid, were transferred to the Fort Street & Elmwood Avenue railway, a corporation organized as aforesaid. That by special act of the legislature of the State of Michigan, passed in 1871, the title of the said railway company was changed

from the "Fort Street & Elmwood Avenue railway" to the "Fort Wayne & Elmwood Railway Company." That by an ordinance duly enacted by the common council of the city of Detroit, and approved June 30th, 1880, all the powers and privileges conferred upon the said railway company by the ordinance of January 31st, 1865, before mentioned, and the amendments thereto, were extended and limited to a further period of thirty years.

3. Your petitioner shows that by a resolution of the township board of the township of Springwells, Wayne county, Michigan, passed on the 17th day of June, 1880, consent, permission and authority *was* given to the Fort Wayne & Elmwood Railway Company, its successors and assigns, to lay a single or double track for a street railway, and all necessary and convenient tracks for turnouts, side tracks and switches in and along the following streets and highways in said township, to wit: Commencing at the then westerly terminus of the city of Detroit, westerly, through Fort street to the west line of Clark avenue, where it intersects Fort street; thence through Clark avenue to the River road; thence through said River road to a point opposite Fort Wayne, for a period of thirty years from the date of said resolution.

4. That on July 1st, 1892, the said Fort Wayne & Elmwood Railway Company sold and transferred all its rights, franchises and property, including the rights and franchises above mentioned to the Fort Wayne & Belle Isle Railway Company, a corporation also organized under chapter 95, Howell's Annotated Statutes of Michigan.

3 5. That your petitioner has acquired, by purchase, all of the contract rights, franchises and grants, belonging to the said Fort Wayne & Belle Isle Railway Company herein recited and set forth, and all the lines of street railway, constructed, maintained and operated thereunder; that said lines are now being operated under and by virtue of the terms of said contracts, ordinances, grants and franchises. That your petitioner is possessed of, and has the right to the enjoyment of all of the rights and privileges created and granted by the said various contracts, ordinances, resolutions and grants.

That under the authority and permission as aforesaid, given by the said city of Detroit, and township of Springwells, said Fort Street & Elmwood Avenue railway, the Fort Wayne & Elmwood Railway Company, the Fort Wayne & Belle Isle Railway Company, and your petitioner have constructed and maintained continuously a double-track railway upon and along said Fort street, from said Woodward avenue westerly to the intersection of Clark avenue, and thence through Clark avenue to the river road and beyond. That under, and by virtue of the said contracts, franchises and grants aforesaid, your petitioner is entitled to maintain and operate its said line of street railway upon said streets, in the city of Detroit, and particularly upon said Clark avenue, and said streets are now being occupied so far as necessary, for that purpose. That your petitioner is entitled to be protected in the full enjoyment of its contract rights, and particularly in the enjoyment of those rights above set forth.

6. That under and by virtue of the resolution of the township board, of the township of Springwells, above referred to, the said Fort Wayne & Elmwood Railway Company obtained full and complete permission and authority to construct a double-track street railway upon Clark avenue, from the intersectien of Fort street to the River road, and that under such authority said Fort Wayne & Elmwood railway proceeded to and did construct a double-track street railway upon said Clark avenue between the points named.

8. That after the construction of the said track upon Clark avenue, between Fort street and the River road by the said Fort Wayne & Elmwood Railway Company, certain steam railroad tracks were constructed across said Clark avenue, between said Fort street and the River road, and at right angles with said Clark avenue—making a crossing at right angles also with the tracks of your petitioner. Your petitioner shows that there are at the present
4 time, three railroad tracks crossing the street railway tracks of your petitioner, upon said Clark avenue; that at the time the track of the said Fort Wayne & Elmwood Railway Company was first constructed upon said Clark avenue, at this point, there was no railroad crossing Clark avenue, and that said railroad tracks, and each and all of them have been built and constructed across said Clark avenue since the laying of the track of your petitioner thereupon. Your petitioner shows that the said railroad tracks are under the control or ownership of the so-called Union Terminal Association, of the city of Detroit, Wayne county, Michigan, and that said railroad tracks are used by said association for the running of locomotives and cars thereupon.

9. Your petitioner respectfully shows that it has been served with a certified copy of an order made by Chase S. Osborn, commissioner of railroads, of the State of Michigan, a copy of which order and certificate is hereto attached, and made a part of this petition, and marked Exhibit "A;" that by said order, the said Chase S. Osborn, railroad commissioner, aforesaid, recites that after a personal inspection of the crossing of the said railroad tracks, at Clark avenue, he has decided that the public interest requires additional protection to be provided thereat, and under authority claimed by him, said commissioner of railroads has ordered that within sixty days from the date of said order, to wit: the 7th day of March, A. D. 1900, the said Union Terminal Association Railway Company cause to be constructed, and thereafter operated and maintained, safety gates, and derailing and signaling appliances to be operated day and night by a watchman from a tower; said tower to be constructed at the best point of vision at the said crossing, and so constructed that the said operator may have plain view of all trains or cars on both of the respective lines; that derailers shall be provided, and placed in the tracks of the Fort Wayne & Belle Isle railway, not less than 75 feet from clearance point or crossing, and that signals shall be placed on the tracks of the Union Terminal Association, at a distance of not less than 600 feet from said crossing; said derailers and signals to be operated by levers in said tower, and such levers to be properly interlocked. Your petitioner further shows that in said

order it is provided that the cost and expense of the construction, maintenance and operation of the said gates, tower and derailing and signaling appliances shall be borne by the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company, equally, share and share alike, and that the appliances aforesaid are to be constructed in accordance with the plans to be submitted to and approved by the commissioner of railroads within thirty days from the date of this order, that is to say, March 7th, 1900. And it is further provided that this order shall be subject to modification at any time, when in the opinion of the commissioner of railroads, the public safety will be more effectually secured.

10. Your petitioner further shows that the compliance with this order will involve the expenditure of a large sum of money; first, in the construction of the said safety devices, and after the same are constructed, in the maintenance and repair thereof.

Your petitioner presumes that said railroad commissioner claims authority to make the order aforesaid under act No. 171, laws of 1893. Your petitioner says, however, that said act was passed long after the organization of said Fort Street & Elmwood Avenue railway, and long after said railway was built in said Clark avenue. That the railroad commissioner has no authority, and could be given no authority, to make the said order, *as* any such order applicable to your petitioner, or to any street railroad organized and constructed prior to the enactment of said statute, or any statute on the subject. That the authority of the said railroad commissioner to make such an order does not extend to your petitioner, nor to the Fort Wayne & Belle Isle Railway Company, and if any such authority has been attempted to be given to said commissioner by the legislature of the State, that the same is void, and any attempt to confer such authority is beyond the power of the legislature, unconstitutional and void, and is an attempt to deprive your petitioner, and other street railroads, organized and constructed, prior to the passage of such act, of its property without compensation, and without due process of law.

Your petitioner shows that before said steam railroad tracks were built across said Clark avenue there was no crossing of any kind, railroad or otherwise, between Fort street and the River road. That said crossing was made for the purely private reasons and convenience of the steam railroads constructing same.

That petitioner's street railway system on said Clark avenue is not an embarrassment to said street, but serves to relieve said street from congestion; is only an improved method of using said street, and an adaptation of the same for more convenient travel and accommodation of the public. That your petitioner and said Fort Wayne & Belle Isle Railway Company should not be made to bear the expense of protecting the public street in question from the danger occasioned by the steam railroads referred to; and that said commissioner of railroads has no more authority to make such order than to compel any other traveler upon said street, nor the township or city authorities to bear said expense.

6 That the necessity, if any there be, for the safety appliances, mentioned in said order, and for the construction and maintenance of the same, including the stationing of a watchman at the crossing mentioned, is not due to the presence of your petitioner's tracks, and the operation of your petitioner's street railway upon said Clark avenue, but on the contrary, is due wholly to the construction of the said lines of steam railroad across said Clark avenue at the point mentioned. That said Clark avenue was an existing highway or public street, and for many years had been used as such at the time said steam-railroad tracks were built across said Clark avenue. That permission for the use of said street for street-railway purposes had been obtained, and the street railway now belonging to petitioner had been constructed, and had been in operation for many years prior to the construction of said lines of steam railroad across said street, and was so in operation at the time of the construction thereof, and has been continuously since then to the present time. That the safety devices mentioned in said order are not designed to protect the public, using said highway from the danger of injury from the operation of your petitioner's street railway on said street; and that said appliances will not serve that purpose; but that on the contrary they are designed to protect the public traveling upon said highway from injuries which might otherwise result from the operation of locomotives and cars upon the said lines of steam railroad crossing Clark avenue.

Your petitioner further shows that after the track now belonging to it was laid in said street, and before the said steam-railroad tracks were constructed across said Clark avenue, there was, and could be no necessity for the order aforesaid, nor for any appliances such as therein described, as there was no highway or other crossing at that point. That the said order was made to protect the public using said Clark avenue from accident due to the crossing of said tracks of said Union Terminal Association, and the operation of the same with engines and cars.

Your petitioner shows that safety devices are not made necessary by reason of the operation of its street railway system in said Clark avenue; that your petitioner has a good and lawful right to be upon said street, and to use the same for the purpose of operating its system; and is entitled to the benefit of the same protection from the increased danger resulting from the crossing of said steam railroad as any other member of the public traveling upon said street and highway, and should not be called upon to incur the expense of rendering said street or highway safe, or protect the same from a danger which is not caused by your petitioner or due to its presence in or use of the street.

7 11. It is further shown unto this court that if this order of the railroad commissioner is valid, and must be obeyed, the obligations imposed by it, and the expense of compliance therewith, must be borne by your petitioner, as the successor of said Fort Wayne & Belle Isle Railway Company, to which said order is addressed.

12. Your petitioner represents that it is advised that the said

order of the railroad commissioner is wholly without authority of law, and is void, and without force; and charges that unless it is so declared by this court your petitioner will be subject to a penalty of ten dollars ($10.00) a day, until said order is complied with. That the enforcement of this order is unjust and oppressive, and that unless its enforcement is prevented by this court, your petitioner will be deprived of its property, franchises and rights, without compensation, and without due process of law, and in contravention of section 10, article 1, of the Constitution of the United States, and of a like provision of the constitution of the State of Michigan.

Your petitioner shows that it is without remedy, save in the present application, and prays that your honors cause a writ of mandamus in due form, to be at once issued from this court, commanding and requiring the Honorable Chase S. Osborn, railroad commissioner of the State of Michigan, to vacate the order aforesaid, so far as the same requires, commands or directs the Fort Wayne & Belle Isle Railway Company, or your petitioner to share or bear any of the expense of constructing and maintaining the safety contrivances or appliances mentioned in said order.

DETROIT, FORT WAYNE AND
BELLE ISLE RAILWAY.
A. B. DU PONT, *Gen. Mgr.*

BRENNAN, DONNELLY & VAN DE MARK,
Attorneys for Petitioner.

8 STATE OF MICHIGAN, } ss:
County of Wayne, }

Antoine B. du Pont, being duly sworn, deposes and says that he is the general manager of The Detroit, Fort Wayne & Belle Isle railway, the foregoing petitioner; that he has read the foregoing petition, and is familiar with the matters therein set forth, and that the facts therein contained are true.

A. B. DU PONT.

Subscribed and sworn to before me this second day of April, A. D. 1900.

(S'g'd) HENRY L. LYSTER,
Notary Public, Wayne County, Michigan.

STATE OF MICHIGAN, } ss:
County of Wayne, }

I, Chase S. Osborn, commissioner of railroads of the State of Michigan, do hereby certify, that I have compared the annexed copy of an order for the construction of safety gates and a derailing and signalling appliance at the Clark Avenue crossing of the tracks of the Union Terminal Association in the city of Detroit, with the original order recorded in Book "D," at pages 396 and 397, and that it is a true and correct transcript therefrom, and of the whole of such original.

Commissioner's Seal.

In testimony whereof, I have hereunto set my hand and affixed the seal of the department at Lansing, this seventh day of February, in the year of our Lord one thousand nine hundred.

(S'g'd) CHASE S. OSBORN,
Commissioner of Railroads.

9 STATE OF MICHIGAN,
Office of the Commissioner of Railroads.

In Re Application of THE COMMON COUNCIL OF THE CITY OF DETROIT for Additional Protection at the Clark Avenue Crossing of the Tracks of the Union Terminal Association in the City of Detroit, County of Wayne, Michigan.

Application having been received by the commissioner of railroads from the common council of the city of Detroit, Wayne county, Michigan, for additional protection at the Clark Avenue crossing of the tracks of the Union Terminal Association in said city of Detroit, Wayne county, Michigan.

And after a personal inspection of the premises aforesaid, and after hearing representations of the city officials of the city of Detroit, as well as the arguments of the representatives of the said railroad company above named in relation thereto, and having decided after due deliberation that the public interests required said additional protection at the said crossing:

Now, therefore, by authority vested in me by law, it is hereby ordered:

That within sixty days from date hereof, you, the said Union Terminal Association Railway Company, cause to be constructed and thereafter operated and maintained, safety gates, and derailing and signalling appliances to be operated day and night by a watchman from a tower. Said tower to be constructed at the best point of vision at the said crossing, and so constructed that the said operator may have plain view of movements of all trains or cars on both of the respective lines. Derailers shall be provided and placed in the tracks of the Fort Wayne & Belle Isle railway, not less than 75 feet from clearance point of crossing, and signals shall be placed on the tracks of the Union Terminal Association at a distance of not less than 600 feet from said crossing. Said derailers and signals to be operated by levers in said tower, and such levers to be properly interlocked.

And it is further ordered that cost and expense of the construction, maintenance and operation of the said gates, tower and derailing and signalling appliance, shall be borne by the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company, equally, share and share alike. This appliance to be constructed in accordance with plans to be submitted to and approved by the commissioner of railroads within 30 days from date hereof, and such appliance to be further approved by the commissioner of railroads before being put into use. This order is subject to modification at

any time when in the opinion of the commissioner of railroads the public safety will be more effectually secured.

Commissioner's Seal.

In testimony whereof, witness my hand and official seal of this department at the capitol in the city of Lansing, this 7th day of March, A. D. 1900.

(Signed) CHASE S. OSBORN,
Commissioner of Railroads.

(Endorsed:) Filed April 4, 1900. Chas. C. Hopkins, clerk.

10 *Order to Show Cause.*

At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the eleventh day of April, in the year of our Lord one thousand nine hundred.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Respondent. } 18125.

On reading and filing the petition and accompanying affidavits of the relator, above named, and on motion of Brennan, Donnelly & Van de Mark, attorneys for relator: Ordered, that said respondent, said commissioner of railroads, do show cause to this court on the first day of May next, why a perem-tory mandamus should not be issued out of and under the seal of this court, to compel him, the said Chase S. Osborn, commissioner of railroads, as aforesaid, to vacate the order by him made and entered on the 7th day of March, 1900, directed to the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company (set out in the petition filed heretofore by relator), so far as the same requires, commands or directs the Fort Wayne & Belle Isle Railway Company or your relator to share or bear any of the expense of construction and maintaining the safety contrivances or appliances mentioned in said order.

11 *Answer.*

STATE OF MICHIGAN:

Supreme Court.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Respondent.

The answer of Chase S. Osborn, commissioner of railroads, respondent, in response to the order to show cause entered in the above-entitled cause, on the eleventh day of April, A. D. 1900, to the petition filed therein, respectfully represents and shows:

1. That as to the facts stated in paragraphs one, two, three, four, five, six, eight, and eleven, he has no direct information, but believes, and for the purpose of framing an issue in this case, admits the same to be true as therein stated.

2. That he admits the facts stated in paragraph nine to be true as therein stated.

3. That he denies the facts and conclusions stated in paragraph ten of said petition, except that he admits, as therein stated, that compliance by petitioner, with the order mentioned in said petition, will involve the expenditure of a large sum of money in the construction of the safety devices therein required, and in the maintenance and repair thereof; that this respondent claims authority to, and did, make said order, made on the seventh day of March, A. D. 1900, as stated in said petition, under and by virtue of the provisions of act 171, Public Acts 1893; that the said act was passed long after the organization of the said Fort Street & Elmwood Avenue railway, and long after said railway was built on Clark avenue in the city of Detroit, and that prior to the building of the tracks of the steam railroad mentioned in said petition, across said Clark avenue, there was no crossing of any kind, railroad or otherwise, between Fort street and the River road.

4. That he denies the facts and conclusions stated in paragraph twelve of said petition, with the exception that he admits that if the said order be declared by this court to be valid, petitioner will be subject to a penalty of ten dollars per day until said order is complied with.

12 5. Respondent further answering shows, that the rights privileges, property and franchises of the said petitioner are subject in all things to such reasonable and valid police regulations as are necessary to the common good, and the general welfare of the public; that said act 171, Public Acts 1893, is a legal and valid police regulation, and that section 5 of said act, which provides as follows: "The commissioner of railroads shall, as soon as possible after the passage of this act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection

against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable," conferred upon him the authority and duty to make the order which this proceeding is instituted to vacate and set aside.

6. That after a careful examination and inspection of the place of intersection of the petitioner's railroad tracks with those of the Union Terminal Association upon the said Clark avenue in the city of Detroit as aforesaid, he determined and decided, under and by virtue of the authority conferred upon him by the said act, that the said crossing was dangerous, and that the general welfare and public good required protection against accident, and to that end, made and entered the said order; that the said safety appliances so required to be constructed and maintained in said order, are not required on account of the presence of the steam road merely, but on account of the intersection of the tracks of the said steam railroad in connection with the tracks of the said petitioner; that if the tracks of the said petitioner were not in Clark avenue, and did not cross the tracks of the said steam railroad, the said safety appliances so ordered as aforesaid, would not be required or necessary in the manner in which the order provides they shall be constructed and maintained; that though the safety gates provided for in such order are designed specially for the protection of the general public, traveling on said highway, from danger resulting from the said steam railroad, still, the derailing and signalling appliances are intended to protect the traveling public on both electric and steam road- from collision at the crossing of the two roads, and that the necessity for the said safety devices results equally as much from the existence and presence of the petitioner's tracks as from the presence of the tracks of the Union Terminal Association.

7. That the first of the tracks of the said Union Terminal
13 Association, as respondent is informed and verily believes were built across Clark avenue, and across the tracks of the, said petitioner, in October, 1881, within a year and a half after consent, permission, and authority had been granted to the Fort Street & Elmwood Avenue Railway Company, its successors and assigns, to lay its tracks in Clark avenue from its intersection with Fort street to the River road; that at the time the said track or tracks of the said Union Terminal Association were built across said Clark avenue and the tracks of said petitioner, that portion of the city of Detroit was not thickly settled, and there was no reason or necessity for such safety appliances which are now required; that the necessity for such safety appliances is the result of the growth of, and changing conditions in that portion of the city of Detroit; that the said petitioner, in accepting rights, privileges and franchises in said Clark avenue, accepted the same subject to the changing circumstances and conditions on account of the growth of the surrounding territory, and such resulting police regulations as the exigencies of the situation require.

This respondent therefore submits that the said order, and the

statute authorizing the same are valid police regulations, and that the mandamus prayed for in said petition should not is-ue.

CHASE S. OSBORN,
Commissioner of Railroads.

HORACE M. OREN,
Attorney General, for Respondent.

STATE OF MICHIGAN, }
County of Ingham. }

On this first day of May, A. D. 1900, before me, a notary public in and for said county, personally came Chase S. Osborn, commissioner of railroads, and made oath that he has read the foregoing answer by him subscribed and knows the contents thereof; that the same is true of his own knowledge except as to the matters which are therein stated to be on information and belief, and as to those matters, he believes it to be true.

ALBERT DUNBAR,
Notary Public in and for Jackson County.

(Endorsed:) Filed May 1, 1901. Chas. C. Hopkins, clerk supreme court.

14 STATE OF MICHIGAN:

Supreme Court.

FORT WAYNE & BELLE ISLE R'Y, Relator, }
vs.
CHASE S. OSBORN, Commissioner of Railroads. }

Amended Petition.

To the honorable the justices of the supreme court of the State of Michigan:

The petition of the Detroit, Fort Wayne & Belle Isle railway, a corporation, organized and existing under and by virtue of the laws of the State of Michigan, respectfully shows:

1. That your petitioner is a street railway corporation, organized as such under and by virtue of the provisions of chapter 95, Howell's Annotated Statutes of Michigan, providing for the incorporation of street railway companies, and is now, and has been since its incorporation, engaged in maintaining and operating an electric street railway system in and through the city of Detroit, as hereinafter more particularly set forth.

2. That the Fort Street & Elmwood Avenue railway was a corporation organized under and by virtue of chapter 94, of Howell's Annotated Statutes of Michigan, in February, 1865, for the purpose of constructing and operating a street railway through the streets in the city of Detroit. That said act of the legislature under which said Fort Street & Elmwood Avenue railway was organized, was subject to amendment, and was subsequently amended by an act of

the legislature; which said amendment now constitutes section 3527 of Howell's Annotated Statutes. That by virtue of an ordinance duly passed by the common council of the city of Detroit, January 31st, 1865, Frederick Buhl, John P. Clark and Eber B. Ward, their associates, successors and assigns, were given consent, permission and authority to lay a single or double track railway, with all the necessary and convenient tracks for turnouts, side tracks and switches along, and upon certain of the streets of the city of Detroit, commencing at the westerly limits of the city of Detroit, as then existing, where Fort
15 street intersected said westerly limits—thence easterly through Fort street to Woodward avenue, and upon certain other streets in said city. Said grant, and the powers, rights and privileges conferred thereunder, were to extend and continue for a period of thirty years from the date of the passage of said ordinance. That thereafter all the rights, powers and privileges granted by said ordinance to said Frederick Buhl, John P. Clark and Eber B. Ward aforesaid, were transferred to the Fort Street & Elmwood Avenue railway, a corporation organized as aforesaid. That by special act of the legislature of the State of Michigan, passed in 1871, the title of the street railway was changed from the "Fort Street & Elmwood Avenue railway" to the "Fort Wayne & Elmwood Railway Company." That by an ordinance duly enacted by the common council of the city of Detroit, and approved June 30th, 1880, all the powers and privileges conferred upon the said railway company by the ordinance of January 31st, 1865, before mentioned, and the amendments thereto, were extended and limited to a further period of thirty years.

3. Your petitioner further shows that in the year 1865 the township board of the township of Springwells granted unto the Fort Street & Elmwood Avenue railway, its successors and assigns, full consent, permission and authority to lay a single or double track for a street railway, and all necessary and convenient tracks for turnouts, side tracks and switches in and along certain streets and highways in said township, including the following, to wit: Upon Clark avenue from the intersection of said street with Fort street; thence through Clark avenue to the River road, thence through said River road to a point opposite Fort Wayne. That by a resolution of the township board of the township of Springwells, Wayne county, Michigan, passed on the 17th day of June, 1880, further consent, permission and authority *was* given to the Fort Wayne & Elmwood Railway Company, its successors and assigns, to lay a single or double track for a street railway, and all necessary and convenient tracks for turnouts, side tracks and switches in and along the following streets and highways in said township, to wit: Commencing at the then westerly terminus of the city of Detroit, westerly, through Fort street to the west line of Clark avenue, where it intersects Fort street; thence through Clark avenue to the River road; thence through said River road to a point opposite Fort Wayne, for a period of thirty years from the date of said resolution.

4. That on July 1st, 1892, the said Fort Wayne & Elmwood Rail-

way Company sold and transferred all its rights, franchises and property, including the rights and franchises above mentioned, to the Fort Wayne & Belle Isle Railway Company, a corporation also organized under chapter 95, Howell's Annotated Statutes of Michigan.

16 5. That your petitioner has acquired, by purchase, all of the contract rights, franchises and grants, belonging to the said Fort Wayne & Belle Isle Railway Company herein recited and set forth, and all the lines of street railway constructed, maintained and operated thereunder; that said lines are now being operated under and by virtue of the terms of said contracts, ordinances, grants, and franchises. That your petitioner is possessed of, and has the right to the enjoyment of all the rights and privileges created and granted by the said various contracts, ordinances, resolutions and grants.

That under the authority and permission given by the said city of Detroit, and township of Springwells, said Fort Street & Elmwood Railway Company, the Fort Wayne & Belle Isle Railway Company, and your petitioner, have constructed and maintained continuously a double-track railway upon and along the said Fort street, from said Woodward avenue westerly to the intersection of Clark avenue, and thence through Clark avenue to the River road and beyond. That under and by virtue of the said contracts, franchises and grants aforesaid, your petitioner is entitled to maintain and operate its said line of street railway upon said streets, in the city of Detroit, and particularly upon said Clark avenue, and said streets are now being occupied so far as necessary, for that purpose. That your petitioner is entitled to be protected in the full enjoyment of its contract rights, and particularly in the enjoyment of those rights above set forth.

6. That in the year 1866, under the authority granted as aforesaid, the said Fort Wayne & Elmwood Railway Company constructed a street railway upon Clark avenue from the intersection of Fort street to the River road, and thence upon said River road to Fort Wayne, and had, since said year, through itself and its successors aforesaid, maintained and operated continuously a street railway thereupon.

8. Your petitioner shows that until the year 1882 or 1883 there was no crossing of any kind, either that of a railroad or of a public highway, or private roadway, street or alley over said Clark avenue, between said Fort street and said river road; that about the year 1882 or 1883 a single railroad track was constructed across said Clark avenue, and across petitioner's tracks, by the Wabash, St. Louis & Pacific Railroad Company, or by the Wabash Railroad Company, as it was familiarly known, and that from thenceforth the said track was used by said Wabash Company as a crossing.

That in the year 1893 or thereabouts, the so-called Union Terminal Association opened a new union station or depot at the corner of Fort and Third streets, in the city of Detroit, and that since that time said station has been used jointly by the Wabash Rail-

17 road Company, the Detroit, Lansing & Northern Railroad Company, and the Flint & Pere Marquette Railroad Com-

pany, as a terminal point, the number of tracks over said Clark avenue at this point have been increased from one to three, to accommodate the increased traffic. That within the past three years the Detroit, Lima & Northern Railroad Company has also begun to use the said new union station as a terminal point, and that all of the above roads at the present time run their trains over the aforesaid crossing at Clark avenue. That in addition to the above roads, the Canadian Pacific Railway Company uses the said union station as a terminal, and connects with the Wabash Railroad Company for the purpose of conducting a through east and west passenger and freight business. That at the present time, by reason of these facts, there is a large amount of freight and passenger traffic upon the said railroad tracks, crossing Clark avenue, at this point, there being at the present time thirty-eight passenger trains each day passing thereover.

Your petitioner shows that all of the said tracks, and all of the said traffic were laid and begun after the construction of petitioner's tracks on Clark avenue, as above set forth; that the said railroad tracks are under the control or ownership of the so-called Union Terminal Association, of the city of Detroit, Wayne county, Michigan, and are used by said association for the running of locomotives and cars thereupon, as already appears.

9. Your petitioner respectfully shows that it has been served with a certified copy of an order made by Chase S. Osborn, commissioner of railroads, of the State of Michigan, a copy of which order and certificate is hereto attached, and made a part of this petition, and marked Exhibit "A;" that notice was given by respondent to relator and the Union Terminal Association, and a hearing had, at which relator's representative objected to the making of said order; that by said order, the said Chase S. Osborn, railroad commissioner, aforesaid, recites that after a personal inspection of the crossing of the said railroad tracks, at Clark avenue, he has decided that the public interest requires additional protection to be provided thereat, and under authority claimed by him, said commissioner of railroads has ordered that within sixty days from the date of said order, to wit: the 7th day of March, A. D. 1900, the said Union Terminal Association Railway Company cause to be constructed, and thereafter operated and maintained, safety gates, and derailing and signalling appliances, to be operated day and night by a watchman from a tower; said tower to be constructed at the best point of vision at the said crossing, and so constructed that the operator may have plain view of all trains or cars on both of the respective lines; that derailers shall be provided, and placed in the tracks of the Fort Wayne & Belle Isle railway, not
18 less than 75 feet from clearance point or crossing, and that signals shall be placed on the tracks of the Union Terminal Association, at a distance of not less than 600 feet from said crossing; said derailers and signals to be operated by levers in said tower, and said levers to be properly interlocked. Your petitioner further shows that in said order it is provided that the cost and expense of construction, maintenance and operation of the said gates,

tower and derailing and signalling appliances shall be borne by the Union Terminal Association and the Fort Wayne & Belle Isle Railway Company, equally, share and share alike, and that the appliances aforesaid are to be constructed in accordance with the plans to be submitted to and approved by the commissioner of railroads within thirty days from the date of this order, that is to say, March 7th, 1900. And it is further provided that this order shall be subject to modification at any *when* when, in the opinion of the commissioner of railroads, the public safety will be more effectually secured.

10. Your petitioner further shows that the compliance with this order will involve the expenditure of a large sum of money; first, in the construction of the said safety devices, and after the same are constructed, in the maintenance and repair thereof.

Your petitioner presumes that said railroad commissioner claims authority to make the order aforesaid under act No. 171, Laws of 1893. Your petitioner says, however, that said act was passed long after the organization of said Fort Street & Elmwood Avenue railway, and long after said railway was built in said Clark avenue. That the railroad commissioner has no authority, and could be given no authority to make the said order, or any such order applicable to your petitioner, or to any street railroad organized and constructed prior to the enactment of said statute, or any statute on the subject. That the authority of the said railroad commissioner to make such an order does not extend to your petitioner, nor to the Fort Wayne & Belle Isle Railway Company, and if any such authority has been attempted to be given to said commissioner by the legislature of the State, that the same is void, and any attempt to confer such authority is beyond the power of the legislature, unconstitutional and void, and is an attempt to deprive your petitioner, and other street railroads, organized and constructed, prior to the passage of such act, of its property without compensation, and without due process of law.

Your petitioner shows that before said steam railroad tracks were built across said Clark avenue there was no crossing of any kind, railroad or otherwise, between Fort street and the River road. That said crossing was made for the purely private reasons and convenience of the steam railroads constructing the same.

19 That petitioner's street-railway system on Clark avenue is not an embarrassment to said street, but serves to relieve said street from congestion; is only an improved method of using said street, and an adaptation of the same for more convenient travel and accommodation of the public. That your petitioner and said Fort Wayne & Belle Isle Railway Company should not be made to bear the expense of protecting the public street in question from the danger occasioned by the steam railroads referred to; and that said commissioner of railroads has no more authority to make such order than to compel any other traveler upon said street, or the township or city authorities to bear the expense.

That the necessity, if any there be, for the safety appliances mentioned in said order, and for the construction and maintenance of the

same, including the stationing of a watchman at the crossing mentioned, is not due to the presence of your petitioner's tracks, and the operation of your petitioner's street railway upon said Clark avenue, but on the contrary, is due wholly to the construction of the said lines of steam railroad across said Clark avenue at the point mentioned. That said Clark avenue was an existing highway or public street, and for many years had been used as such at the time said steam-railroad tracks were built across said Clark avenue. That permission for the use of said street for street-railway purposes had been obtained, and the street railway now belonging to petitioner had been constructed and had been in operation for many years prior to the construction of said lines of steam railroad across said street, and was so in operation at the time of the construction thereof, and has been continuously since then to the present time. That the safety devices mentioned in said order are not designed to protect the public, using said highway from the danger of injury from the operation of your petitioner's street railway on said street; and that said appliances will not serve the purpose; but that on the contrary they were designed to protect the public traveling upon said highway from injuries which might otherwise result from the operation of locomotives and cars upon the said lines of steam railroad crossing Clark avenue.

Your petitioner further shows that after the track now belonging to it was laid in the street, and before the said steam-railroad tracks were constructed across said Clark avenue, there was, and could be no necessity for the order aforesaid, nor for any appliances such as therein described, as there was no highway or other crossing at that point. That the said order was made to protect the public using said Clark avenue from accident due to the crossing of said tracks of said Union Terminal Association, and the operation of the same with engines and cars.

Your petitioner shows that safety devices are not made necessary by reason of the operation of its street-railway system in said Clark avenue; that your petitioner has a good and lawful right to be upon said street; and to use the same for the purpose of operating its system; and is entitled to the benefit of the same protection from the increased danger resulting from the crossing of said steam railroad as any other member of the public traveling upon said street and highway, and should not be called upon to incur the expense of rendering said street or highway safe, or protect the same from a danger which is not caused by your petitioner or due to its presence in or use of the street.

11. It is further shown unto this court that if this order of the railroad commissioner is valid, and must be obeyed, the obligations imposed by it, and the expense of compliance therewith, must be borne by your petitioner as the successor of the said Fort Wayne & Belle Isle Railway Company, to which said order is addressed.

12. Your petitioner represents that it is advised that the said order of the railroad commissioner is wholly without authority of law, and is void, and without force; and charges that unless it is so declared by this court, your petitioner will be subject to a penalty

of ten dollars ($10) a day, until said order is complied with. That the enforcement of this order is unjust and oppressive and that unless its enforcement is prevented by this court, your petitioner will be deprived of its property, franchises and rights, without compensation, and without due process of law, and in controvention of section 10, article 1, of the Constitution of the United States, and of a like provision of the constitution of the State of Michigan, and will also be denied the equal protection of the laws in controvention of section 1, of the fourteenth amendment of the Constitution of the United States.

Your petitioner shows that it is without remedy, save in the present application, and prays that your honors cause a writ of mandamus in due form, to be at once issued from this court, commanding and requiring the Honorable Chase S. Osborn, railroad commissioner of the State of Michigan, to vacate the order aforesaid so far as the same requires, commands or directs the Fort Wayne & Belle Isle Railway Company, or your petitioner, to share or bear any of the expense of constructing and maintaining the safety contrivances or appliances mentioned in said order.

DETROIT, FORT WAYNE & BELLE ISLE RAILWAY.
JOS. BAMPTON, *Secretary.*

BRENNAN, DONNELLY & VAN DE MARK,
Attorneys for Petitioner.

STATE OF MICHIGAN, *County of Wayne,* } ss:

Joseph Bampton, being duly sworn, deposes and says that he is the secretary of The Detroit, Fort Wayne & Belle Isle Railway, the foregoing petitioner; that he has read the foregoing petition, and is familiar with the matters set forth, and that the facts therein contained are true.

JOS. BAMPTON.

Subscribed and sworn to before me this fourth day of January, 1901.

JULIAN H. HARRIS,
Notary Public, Wayne County, Michigan.

(Endorsed:) Filed Jan. 5, 1901. Chas. C. Hopkins, clerk.

21 STATE OF MICHIGAN:

Supreme Court.

DETROIT, FT. WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Railroad Commissioner, Respondent.

It is agreed as follows:

That petitioner's street railway was a single-track horse railway on Clark avenue when first steam railroad track was constructed.

That subsequently, in 1881, it was changed to a double-track street railway and equipped and operated with electric power in 1891. That thereafter, in 1891, a second steam railroad track was constructed and put in operation by the steam railroad company at the crossing in question, and somewhat later a third track for switching purposes was extended across the highway at the point in question, and is now in use for those purposes as desired. That there has been a substantial increase in the amount of business done by the street railway petitioner on its line on Clark avenue since it was first constructed, cars passing said crossing every few minutes. These facts may be considered as incorporated in the petition, anything therein inconsistent being considered as amended. It is also agreed that petition may be further amended so as to allege that the statutory provision and the order of the railroad commissioner in question deprives petitioner of the equal protection of the laws, in contravention of section 1 of the 14th amendment of the Constitution of the United States.

January 9th, 1901.

BRENNAN, DONNELLY & VAN DE MARK,
Attorneys for Relator.

HORACE M. OREN,
Attorney General, Attorney for Respondent.

(Endorsed:) Filed Jan. 9, 1901. Chas. C. Hopkins, clerk.

An order was entered on the ninth day of January, 1901, by consent of both parties, permitting the filing of the foregoing amended petition, and that the same stand in the place of the original petition, and that the answer to the original petition should stand as the answer to the amended petition.

It is as follows:

22 *Order.*

At a session of the supreme court of the State of Michigan held at the supreme court room, in the capitol, in the city of Lansing, on the ninth day of January in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent. } No. 18215.

In this cause, the attorneys for both parties consenting thereto, it is ordered that the amended petition filed in this cause on January 5, 1901, as amended by stipulation this day, stand as the original petition in the cause, and that respondent's answer heretofore filed, stand as the answer to said petition.

23 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the ninth day of January in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice; Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

THE DETROIT, FT. WAYNE & BELLE ISLE RAILWAY, Relator, *vs.* COMMISSIONER OF RAILROADS, Respondent. } No. 18125.

This cause coming on to be heard is argued by Mr. Donnelly for relator, and by Mr. F. A. Maynard for respondent, and submitted.

24 Supreme Court.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, Re'ator, *vs.* CHASE S. OSBORN, Commissioner of Railroads of the State of Michigan, Respondent.

Opinion.

The following statement of facts is taken from the brief of counsel for relator:

"The petition and answer filed in this cause set out as briefly as practicable the facts in the case. In substance they are that petitioner owns a line of street railway in Detroit, authority to construct and operate which was granted in 1865. In the following year the railway was built, forming a continuous line west on Fort street to Clark avenue, south on Clark to the River road, and then west again on the River road. At the time the track was constructed on Clark avenue there was no railroad, or highway, street, lane or alley or crossing of any kind over Clark avenue between Fort street and the River road.

In 1882 or 1883 the Wabash railroad constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue between Fort street and the River road, of any kind, either that of a railroad or a public highway, a private way, road, street or alley. In the year 1893, or thereabouts, the union station was opened at the corner of Third and Fort streets in Detroit; and since that time said station
25 has been used jointly by the Wabash, the Detroit, Lansing & Northern, the Flint & Pere Marquette, the Detroit & Lima Northern, and the Canadian Pacific railroads as a terminal point, the tracks over Clark avenue at this point having been increased from one to three to accom-odate the increased traffic. These tracks are used as approaches to the union station, and incoming and out going trains and cars of all the foregoing roads, except the C. P

R. R., pass over said tracks. There are 38 regular daily passenger trains crossing Clark avenue upon these tracks. Besides this the Canadian Pacific uses the station as an eastern terminus connecting with the other roads for purposes of through east and west traffic.

In 1893 the legislature passed an act, No. 171, which provides (sec. 5), that the 'commissioner of railroads shall * * * examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat as in his judgment ought to be made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable.'

Claiming authority under this act the respondent has ordered the construction of certain safety devices and apportioned the expense between the Terminal Association and the Fort Wayne & Belle Isle Railway Company. Petitioner must bear whatever expenses can properly be imposed upon the Fort Wayne & Belle Isle Railway Company."

The petition in this case is filed for the purpose of having the order set aside. The answer alleges that if the street railway tracks were not constructed in said street "and did not cross the tracks of said steam railroad, the said safety appliances so ordered as aforesaid would not be required or necessary in the manner in
26 which the order provides they shall be constructed and maintained; and though the safety gates provided for in such order are designed specially for the protection of the general public, traveling on said highway from danger resulting from said steam railroad, still the derailing and signalling appliances are intended to protect the traveling public on both electric and steam roads from collision at the crossing of the two roads, and that the necessity for the said safety devices results equally as much from the existence and presence of the petitioner's tracks as from the presence of the tracks of the Union Terminal Association."

Counsel for the relator in their brief say,

"There are a number of important questions involved in this controversy, one being the extent of the authority of the railroad commissioner over street railway companies. We feel it necessary, however, to suggest only one of these questions, because the adjudication thereof in the manner we anticipate will render a consideration of the others unnecessary.

We call attention to the fact fully set out in the petition that the necessity for the order of the railroad commissioner, if any there be, is due to the construction of the Terminal Association's tracks after petitioner's tracks were laid. The danger is not caused by petitioner, nor due to its presence in the street. Under the well-settled rule of this court the cost of making the crossing safe must be borne by the company making the crossing and responsible for the danger.

In People *v.* Lake Shore & M. C. R'y Co., 52 Mich. 277, it was decided that a statute requiring a railroad company to bear the expense of constructing and maintaining a crossing for a *crossing*

for a highway which was laid out after the railroad was built was unconstitutional and void. The court said that "as far as the same can be reasonably accomplished it (the crossing road) shall reduce the inconvenience occasioned to the public by its own pecu-
27 liar mode of enjoyment, to a minimum. But when the reason ceases the right of interference must cease." And it was held that the railroad could not be made to bear the expense of crossing because it was "not a contrivance which the existence of the railroad renders necessary, and which otherwise would be needless."

In Chicago & G. T. R. R. Co. *v.* Hough *et al.*, 61 Mich. 507 it was said:

"If a railroad interferes with an existing highway it must bear all the expense of crossing and restoring the highway, as far as practicable, to a safe condition. * * * But as pointed out in 52 Mich. 277, when a new highway is created, then it belongs to those who created it to bear the expense of making the crossing in the condition necessary to meet all the expense and danger it occasions."

The danger which the commissioner wishes to guard against not being in existence before the railroad crossing was constructed, it belongs to the Union Terminal Association, which created it, to "bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions."

The same principle is recognized and enforced in the following cases: Grand Rapids *v.* G. R. & I. R. R. Co. 58 Mich. 647; Commissioner *v.* R. R. Co. 90 Mich. 385; Commissioners etc. *v.* R. R. Co. 91 Mich. 291; Commissioners etc. *v.* R'y Co. 93 Mich. 58; City of Grand Rapids *v.* Bennett, 106 Mich. 528; Sage *v.* Township of Pittsfield, 6 D. L. M. 204; F. & P. M. R'y Co. *v.* D. L. & N. R'y 64 Mich. 350.

An examination of these cases will show, they were all cases where it was sought to obtain a right of way either for a railroad across a highway, or for a highway across a railroad, or a
28 crossing for one railroad over the right of way of another, and none of the cases relate to the question involved here as to who shall bear the expense of additional safeguards ordered upon roads, which have crossed each other for a long period of time. An examination of the cases will also disclose that in proceedings by one road for a right of way over another, there are some inconveniences and burdens which must be borne by the senior road for which it is not entitled to compensation from the junior road. In the case of the F. & P. M. R. R. Co. *v.* D. & B. C. R. R. Co. 64 Mich. 350 the former company sought to obtain a right of way over the railroad track of the defendant company. The commissioners allowed only one hundred dollars for the land taken, and the consequential damages. The defendant company gave evidence tending to show that it would suffer a yearly expense, as the result of establishing the crossing, of fifty dollars cost for maintaining signals, four hundred and twenty-five dollars cost of watchman, and three hundred dollars cost of stopping trains, and claimed the allowance made by the commissioners was grossly inadequate, but the court declined to disturb it.

In discussing the question, Justice Champlin used the following language:

"The question as to what elements of damages should enter into and form a basis of an award when one railroad crosses another has been before the courts of some of our sister States; and while the decisions have not been entirely uniform, the principles underlying them all point to an allowance which shall secure a just compensation within the recognized rules of evidence relating to damages, as including all loss or injury which is the direct result of the appropriation of the land to the new use. They also recognized that there are elements of damage which, aside from being uncertain, remote, or conjectural, are the consequence of regulations by the legislature designed to secure the safety of the public, which are imposed
29 upon all railroad companies alike, and which, in so far as they do not involve any structural change in the property itself in order to make it conform to the new condition, no not afford a basis for compensation.

The result of the decision in Massachusetts was announced by Mr. Chief Justice Gray in Mass. Cent. R. R. Co. *v.* Boston, C. & F. R. R. Co., 121 Mass. 124, tersely as follows:

"A railroad corporation across whose road another railroad or a highway is laid out has the like right as all individuals or bodies politic and corporate, owning land or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accom-odate its own land to the new condition. Com. *v.* Boston & M. R. R. 3 Cush. 25, 53; Old Colony R. R. Co. *v.* Plymouth, 14 Gray, 155; Grand Junction R. R. Co. *v.* County Com'rs of Middlesex, *id.* 553. But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad. Proprietors of Locks and Canals *v.* Nashua & L. R. R. Co. 10 Cush. 365, 392; Boston & W. R. R. Co. *v.* Old Colony R. R. Co. 12 Cush. 605, 611; S. C. 3 Allen, 142, 146; Old Colony R. R. Co. *v.* Plymouth, 14 Gray, 155."

In Illinois the principle was laid down in the case of Chicago & W. I. R. R. Co. *v.* Englewood Connecting R'y Co. 115 Ill. 375 (S. C. 23 Amer. & Eng. R. R. Cas. 56), founded upon the manifest
30 fact that the value of a railroad property, outside of the advantages of location and amount of business it controls, consists in the strength, permanency, and durability of its structures, and its adaptability to and capacity for doing railroad business;—

"That, whenever the proposed condemnation and subsequent user will injuriously affect such a property in either of these respects, the injury thus occasioned will form a proper basis for the assessment of damages in a proceeding of this kind."

"In this case the court on the trial excluded all evidence from the jury tending to show that either the value of the respondent's road, or its capacity to do the business of the company, would be impaired by the proposed crossing; and the court, upon a review of the authorities in that State, held that the court below erred. It had previously been held by that court that the law requiring trains to stop before reaching and crossing another road was a police regulation, and might be maintained or repealed at the pleasure of the legislature; that it would therefore be mere conjecture as to what, if any, damages would be sustained for the delay, inconvenience, and trouble produced by complying with the requirements of the statute; and that, independent of the statute, the same duty would be imposed, and that it was too vague and uncertain to be an element of damages. Peoria & P. U. R'y Co. *v.* Peoria & F. R'y Co. 105 Ill. 110."

"The point was more fully considered in an opinion filed at the same time with that above cited, and reported in the same volume, at page 388, in which a rehearing was denied at the March term, 1883, in which the majority of the court held that damages occasioned by the stopping of trains could not be considered in awarding compensation (Chicago & A. R. R. Co. *v.* Joliet, L. & A. R'y Co.). These decisions have not been overruled in that State. Such is also the conclusion reached by the supreme court of Ohio. Lake Shore & M. S. R'y Co. *v.* Cincinnati, S. & C. R'y Co. 30 Ohio
31 St. 604."

"I think that the stopping of trains, whether required by the law as a police regulation, or by the duty of the company in order to secure the safety of persons transported, is not an element which can be considered by the jury in estimating the damages and compensation to be made."

"The general railroad law requires trains to come to a full stop, before crossing the track of another railroad, not nearer than 200 nor more than 800 feet from the crossing. It regulates the precedence which trains shall have in crossing, and prescribes penalties for disobedience of the regulations. These are police regulations enacted by the legislature designed to promote the public safety, and are as binding upon an existing road as one newly organized. They stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedience to its requirements. It is subject to amendment or repeal at any time the legislature may see fit; and for this reason, as well as for the absolute impossibility of determining in advance the number of trains which in the future operation of the road would be required to stop at such crossing, the damage arising therefrom, is uncertain and conjectural. But, aside from this, any inconvenience or annoyance or loss suffered in obeying the police regulations of the sovereign authority is *damnum absque injuria.*" * * *

"In the absence of the statute, the duty imposed by the circumstances upon the corporation to adopt and observe proper precautions to protect the lives of persons committing themselves to its care takes the force of law, and has its foundation in the same principles which

underlie police regulations, namely, the protection and welfare of the public. In other words the police regulation requiring trains to stop does not create a new duty, but compels the observance of an existing duty by the corporation. The statute or duty merely
32 regulates the mode in which the corporation shall exercise its franchise. This incident to crossing takes no land, requires no structural change in the property, and deprives the corporation of no right granted by its charter. It does not lie within the scope of injuries for which compensation should be made.

The cost of maintaining signals or a crossing system would be a proper matter for the consideration of the commissioners, as well as cost of watchman. These expenses however, are subject to contingencies which may cause the damages to fluctuate, and possibly be reduced to a nominal sum.

The other cases cited are in harmony with the views expressed by Justice Champlin. These cases undoubtedly establish the doctrine, that within the limits of the rule as described by Justice Champlin, the junior highway or railroad seeking a crossing must bear all the expense of making the crossing and restoring the highway or railroad crossing as far as practicable to safe conditions. This however relates to the conditions as they exist at the time the crossing is made, and not to conditions which may or may not arise thereafter. The damages must be real, tangible and proximate; allowances may not be made for possible or probable contingencies; Grand Rapids *v.* Bennett, 106 Mich. 528 and cases there cited.

We then come to the question of what the status of the two roads is after the compensation is made and the right of user by the junior road is obtained? While this question has never been, so far as we know before this court, it has been before other courts. In Railway *v.* Railway, 30 Ohio St. 604, there is a full discussion of this aspect of the case:

"The franchise to be a corporation, entitled as such to own a right of way and to operate a railroad thereon, is granted by the State for the public benefit, in consideration of the supposed benefits accruing to the State and its people from the improvement and its use.

33 The tangible property held for corporate purposes is a means of carrying out the purposes of the corporation.

Each corporation has granted to it so much of the right of eminent domain as is necessary to obtain its right of way and to construct its road.

The charters of these corporations are obtained under a general law, to authorize the creation and regulation of incorporated companies. 1 S. & C. 271.

The fact that one charter is older than another, does not give it exclusive privileges or superior powers in prosecuting its business as public carrier of persons and property.

If the elder company has exercised its power to condemn property for its right of way, and has constructed and is operating its road, that does not withdraw its property from the equal power of

condemnation of its right of way, for a crossing, to be enjoyed in common by a junior company.

Such appropriation, to be used on equal and common terms, does not operate as a subversion or destruction of the former public use. It is only an increased burden upon its use imposed for public purposes." * * *

"The right of the one to cross the track of the other, is as clear and undoubted as was the right of the other, in the first instance to cross the land of the original owner. They each derive this right by grant from the State and not by purchase of the other.

In each case the constitution protects the private property by requiring compensation to be paid.

The right of transit across a railroad rests upon the same grounds as that of the right of railroads to cross the canals, rivers, and common highways of the State, and is as important a public use as the right of transit along them.

New channels of trade and commerce and new highways
34 for public travel are essential to the growth and development of the State and the convenience and comfort of its people, and the power of the State to provide them is one of those sovereign powers held in trust for the public welfare, which it has no right to grant away or surrender.

This grant to railroad corporations is for the public accom-odation. To assume that the road first located and constructed has the exclusive franchise of operating a road over the point of crossing, and that this right, as well as the property, must be paid for by the second road, does violence to the well-settled public policy of the State.

These corporations owe their existence and the right to exercise their franchises and privileges to the principle, that the State may employ such agencies as it may deem proper to promote the public welfare. These roads are great public highways, and as such are amenable to such reasonable regulations, not inconsistent with vested rights of private property, as will promote that object." * * *

"When both roads are constructed, they are operated under charters granting equal franchises and privileges, and both are alike subject to the obligations that may be lawfully imposed.

When the younger corporation has acquired its right of property in common with the older in a crossing, they become joint and equal owners, bound by mutual obligations to each other and to the public, to so use this common right as to do no unnecessary harm to the other or to the public.

To each corporation the maxim, "*Sic utere tuo ut alienum non lædas*," applies with special force. To enforce the principles of that maxim, and in the legitimate exercise of the police power of the State, the act of March 24, 1860 (S. & C. 372*a*), was passed." * * *

"When the appropriation is made, paid for, and put to
35 the new use, both companies stand on a perfect equality as to rights and privileges in the use of the crossing."

We can see no fault in the logic of this opinion. When the right to use the crossing is once acquired, the right of the several corporations

to this use is reciprocal so far as is consistent with the kind of use made of the crossing by them. Of course in the case of a highway crossing over a railroad, from the very nature of the use the foot passengers and persons traveling in vehicles would be required to stop instead of requiring the trains of cars to stop because this would be the only practicable method of running the trains and ensuring the safety of the public. When the joint use of a crossing is obtained is the position tenable, that because one road is older than another, that the junior road must not only compensate the senior road for its present damage before it can cross, but for all time it must bear any additional future cost which may be made necessary by the erection and maintainance of appliances for the safety of the public, resulting from the increased use of the crossing? We think it logically follows from what has already been said, this question must be answered in the negative.

It is said "it cannot be pretended that without the existence of the steam railroad crossing, the railroad commissioner would have any jurisdiction, or that there would be any danger arising from the operation of the street railway which would call for an interference of the railroad commissioner. His jurisdiction only attaches because of the danger arising from the construction and operation of the steam railroad crossing the highway at the point in question."

It is a complete reply to this suggestion to say that if there was no highway at this point traveled by a line of electric railway cars, and by the public, there would be no occasion for the inter-
36 ference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and under the exercise of the police power in the interest of public safety, the State is authorized to interfere through its agent the railroad commissioner. See Nashvill- etc. Railway *v.* Alabama, 128 U. S. 96; Georgia Railroad & Banking Co. *v.* Smith, 128 U. S. 174; Minneapolis etc. Railway *v.* Beckwith, 129 U. S. 26; Dent *v.* West Virginia, 129 U. S. 114; Charlotte, Columbia etc. Railroad *v.* Gibbes, 142 U. S. 386; Minneapolis & St. Louis Railway *v.* Emmons, 149 U. S. 364; N. Y. & N. E. R. R. Co. *v.* Bristol, 151 U. S. 556; Thorpe *v.* Railroad Co. 27 Vt. 150; Woodruff *v.* Caltin, 6 Atlantic R. 853.

It is insisted by counsel for relator that the action of the railroad commissioner cannot be sustained for another reason. We quote from the brief of counsel:

"We contend that a street railway which has been granted a franchise to occupy a public street, acquires a right to use the same in common with other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and if it is built across a highway, it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be, if such railroad were not built across it at all. The authority for

this view is found in the following cases, and although the facts to which the principles involved were applied differed from those of the case at bar, the principles themselves are involved here and must in our opinion control." Citing Railroad Co. *v.* Street Railroad Co. 26 L. R. A. 337; C. B. & Q. R'y Co. *v.* West Chicago St. R'y Co. 156 Ill. 225; 2 Dill Mun. Corp. 4 ed. sec. 722; 29 L. R. A. 486; R'y Co. *v.* Steel, 47 Neb. 741; Railroad Co. *v.* Railroad
37 Co. 149 Pa. St. 1; Grand Rapids *v.* Heisel 38 Mich. 62; Detroit City R'y *v.* Mills, 85 *id.*, 634; Nichols *v.* Railway Co., 87 *id.*, 369.

None of these authorities touch the question involved here. Nearly all of them except the Michigan cases are referred to in Railway Co. *v.* Steel, 47 Neb. 741. The question involved was whether a railroad company was entitled to damages from a street-railway line, seeking a crossing. In disposing of the case the court said,

"The doctrine of the cases cited, and which to us appears altogether reasonable and sound, is that a railroad company acquires no exclusive use of streets crossed by its tracks with the consent of the city or other municipal body, but must enjoy the right so conferred in common with the general public: that it is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities; and that any mere inconvenience suffered by it on account of the crossing of its lines by the tracks of street railways by permission of the proper authorities is *damnum absque injuria*."

In the Michigan cases the question involved was, whether the adjacent owners were entitled to compensation, where the street in front of their land was used by a street railway company. In Railway Co. *v.* Heisel, 38 Mich. 62, Justice Cooley used the following language:

"If the railroad were only a city railway constituting a mere local convenience, and calculated to relieve the pressure of traffic and travel upon the street, the question of course would be different. There are cases which hold it to be competent under proper legislative authority, to permit a street-railway track to be laid, regardless of the consent or of the wishes of abutting proprietors who may own the soil of the street. A street railway for local purposes, so far from constituting a new burden, is supposed to be per-
38 mitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel instead of constituting an embarrassment. It is for this reason that the owners of lands over which a city street is laid are denied compensation if a street railway is subsequently authorized within it."

The same question was involved in the other Michigan cases where electricity was used as motive power. It was held the adjacent owner was not entitled to compensation under the facts disclosed by those cases, though two of the five judges thought the building

of the street railway did impose an additional burden for which compensation should be given to the adjacent owner.

Though the decisions are not uniform it may be considered as now settled by the great weight of authority that the use of a street by a street railway company, under proper regulations even though it use electricity as a motive power, is not an improper use of the street, and is not such an additional burden as to entitle the adjacent proprietor to additional compensation. It does not follow however, from these decisions that the electric car, and the horseless carriage do not increase the danger to those who have a right to travel the streets. If it be asserted that the propulsion of a modern suburban car, forty-five or fifty feet long, which may be propelled at the will of the motorman at a speed from simply moving to forty or fifty miles an hour through the public streets of a city, is not a different use of the street and a source of greater danger to the public, than obtained when the streets were used only by pedestrians and carriages drawn by horses, such an assertion would not commend itself to the common sense of those having cognizance of the facts. The long list of frightful injuries and fatal casualties which occur yearly because of the new methods of travel in all our large cities, would be a complete answer
39 to the assertion. Does it not follow then that, though the modern methods of travel are required by the conditions of modern life, that inasmuch as they may and do increase the danger to human life, that it is entirely competent for the State in its efforts to protect its citizens in the exercise of its police power to provide such regulations at the expense of the persons or corporations employing the new methods, as in its wisdom it deems necessary to accomplish that purpose? Upon what other theory does it regulate the speed of the vehicles traveling the streets. Why does it require, at the expense of the corporation owning street cars, their frequent inspection, or require them to be equiped with powerful brakes, and with safety fenders? Can there be any question but what it would be legal to require steam boilers used to propel horseless carriages to be so constructed as not to be liable to explosion, or to require the person operating such a carriage to be so familiar with its operation before taking it upon a crowded street, that its appearance there should not be a source of danger? It seems to us there can be but one answer to these questions. New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run at frequent intervals, across a railroad over which trains are frequently run, that it is a place of unusual danger, not only to the passengers in the steam cars but also to the passengers in the electric cars. This danger is occasioned not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that under such circumstances the State, in the exercise of its police power can take such steps as will minimize the danger and can impose the expense of doing so, upon the corporations causing the danger.

In Maine a statute similar to the statute of this State, was
40 passed in 1895, authorizing the railroad commissioners in such a case as this one, to apportion the expense between the electric road and the steam road, thought it did not require them to do so. Under this statute the case of Railroad Co. *v.* Street R'y Co. 89 Me. 328 arose. In that case it was claimed as it is claimed here, that the use of the crossing of the steam road by the electric road was simply a use of the highway. We quote from the decision of the commissioners:

"But the counsel for the electric railway company goes further, and in argument claims that by its charter, his company has the right for its electric cars to pass and repass across the rails of the Maine Central Railroad Company, and over the highway, the same as any other vehicle on said highway, and that the Maine Central Railroad Company is obliged, under the law, to make proper provisions for the passage of electric cars across its railroad tracks. He argues that the car of the electric railway is nothing more than the team or vehicle of any other person, or corporation, which has a right to pass and repass within the highway. He argues that the building of an electric railway along the highway in this State is not a new servitude upon the street, and is not a new use of the way, but is only a new and later mode of using the way."

Under the circumstances of that case the commissioners put the expense of putting in the new crossing frogs entirely upon the electric road. The case was removed to the supreme court which declined to disturb the decision of the commissioners, the court using the following language:

"The act of 1895, c. 72, undoubtedly authorizes the railroad commissioners to apportion the expense, but it does not require them to do so. It leaves the question to their sound judgment and discretion. And, on appeal, the only rule prescribed for the presiding justice is that he shall make such order or decree as law and
41 justice shall require. The statute declares that 'exception may be taken to such order or decree,' but it prescribes no rules by which the law courts shall be governed in passing upon the exceptions. It seems to us that the evident intention of the legislature was to leave the whole question of how railroad crossings should be constructed and maintained, and how the expense of such crossings should be borne, in the first instance to the sound judgment and discretion of the railroad commissioners, and we think that their decision should not be altered or reversed unless manifestly illegal or unjust." See Commissioners *v.* Railroad Co. 91 Mich. 291; Woodruff *v.* Catlin, *et al.*, 6 Atl. R. 849; Railroad Co. *v.* Bristol 151 U. S. R. 556.

We have no doubt of the right of the legislature to authorize the railroad commissioner to do what he has sought to do here.

The petition of the relator is denied.

J. B. MOORE.
R. M. MONTGOMERY.
CHAS. D. LONG.

(Endorsed:) Filed July 2, 1901. Chas. C. Hopkins, clerk supreme court.

42 Supreme Court.

DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent.

GRANT, *J.:*

The petitioner owns a line of street railway in Detroit, authority to construct and operate which was granted in 1865. In the following year the railway was built, forming a continuous line west on Fort street to Clark avenue, south on Clark to the River road, and then west again on the River road. At the time the track was constructed on Clark avenue there was no railroad, or highway, street, lane or alley or crossing of any kind over Clark avenue between Fort street and the River road.

In 1882 or '3, the Wabash Railroad Company constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue between Fort street and the River road, of any kind, either that of a railroad or a public highway, a private way, road, street or alley. In the year 1893, or thereabouts, the union station was opened at the corner of Third and Fort streets in Detroit; and since that time said station has been used jointly by the Wabash, the Detroit, Lansing & Northern, the Flint & Pere Marquette, the Detroit & Lima Northern, and the Canadian Pacific railroads as a terminal point, the tracks over Clark avenue at this point having been increased from one to three to accom-odate the increased traffic. These tracks are used as approaches to the union station, and in-
43 coming and outgoing trains and cars of all the foregoing roads, except the C. P. R. R., pass over said tracks. There are 38 regular daily passenger trains crossing Clark avenue upon these tracks. Besides this the Canadian Pacific uses the station as an eastern terminus connecting with the other roads for purposes of through east and west traffic.

In 1893, the legislature passed an act, No. 171, section 5 of which provides that the "Commissioner of railroads shall * * * examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat as in his judgment ought to be made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable."

Claiming authority under this act the respondent ordered the construction of certain devices, and apportioned the expense between the Terminal Association and the petitioner.

The validity of this order presents the main question in the case.

The main question in this case may be thus stated: When a steam railroad company has condemned a right of way and extended its

tracks across a public street or highway, on which is an existing street-car line, and at the time the public travel upon the street or highway was not such as to require the erection of gates, etc., for the protection of the public, but subsequently, owing to the increase of population, the increase of tracks and trains by the railroad company, and the increase of travel upon the street or the highway, the erection and maintenance of such safeguards becomes essential for the protection of the public, can the street railway company
44 be required to pay a portion of the expense?

It is now the settled law of this State, that a street railway does not create an additional servitude. People *v.* Railway Company, 92 Mich. In addition to the authorities cited in Detroit, etc. R. Co. *v.* Mills, 85 Mich., and Nichols *v.* Railway Co., 87 *id.*, see also the following: Chicago, etc., R. Co. *v.* Whiting, etc., 139 Ind. 297, 26 L. R. A. 337; Chicago, etc. R. Co. *v.* West Chicago, etc., R. Co., 156 Ills. 255, 29 L. R. A. 485.

Another well-settled principle is of importance in this discussion, viz: A steam railroad in constructing its tracks across an existing highway must pay all the expense of putting the highway in safe condition and erecting and maintaining such safeguards as are required for the protection of travelers upon the street or highway, as well as those who are traveling upon the steam cars. The correlative proposition is also well established, viz: When a public highway is laid out across an existing railroad, the public must compensate the railroad company, not only for the value of the land taken, but also for the construction of requisite safeguards, including gates, flagmen, fences, cattle-guards, etc., for the protection of the public. Chicago, etc., R. Co. *v.* Hough *et al.*, 61 Mich., 507; Grand Rapids *v.* G. R. & I. R. Co., 58 *id.* 641, 648; Commissioners, etc., *v.* Mich. Cent'l R. Co., 90 *id.* 385; Commissioners, etc., *v.* R. R. Co., 91 *id.* 291; City of Grand Rapids *v.* Bennett, 106 *id.* 528; 8 Am. & Eng. Enc. Law, (2d ed.) 351; Du Bois T. P. R. Co. *v.* Buffalo, etc., R. Co., 10 Pa. C. C. 401.

The elements of damages in such cases are ably discussed by Chief Justice Champlin, in F. & P. M. R. Co. *v.* D., L. & N. R. Co., 64 Mich. 350, and many authorities there cited.

Another well-established principle, important to be here noted, is this: He who creates and maintains a nuisance must pay
45 the cost of abating it; and that business which in its management endangers the persons and property of others, must pay the expense of taking the necessary precaution to avoid the danger,—and it matters not whether that danger existed at the time of the establishment of the business, or arose afterwards. It follows, that in 1882, the Wabash Railroad Company, when it constructed its single track across the highway, and in 1893, when the Union Terminal Association placed its tracks across, they were required by law to pay the expense of all appliances at that time necessary for the protection of the public. So too, if these companies were now making application to cross the highway, they would be compelled to pay the expense of all the appliances which, in this proceeding, the commissioner has divided equally between the relator and the

Union Terminal Association, and would be obliged to do so so long as they did business.

The argument of the learned attorney general seems to be that because, under the circumstances as they existed when the Wabash Railroad Company and the Union Terminal Association constructed their roads, damages for the cost of the appliances now required would then have been uncertain and speculative, and could not have been considered; therefore these companies cannot now be required to bear the entire expense. He states his position as follows:

"In behalf of respondent, I claim that said cases, while establishing the doctrine that a railroad company, whose track is crossed, is entitled to just compensation for all damages which it may have sustained, by reason of such crossing, do not sustain the claim made by counsel for petitioner, namely: that the Union Terminal Association Railway Company must for all time bear the expense for constructing and maintaining the safety contrivances and appliances mentioned in the commissioner's order, for the simple
46 reason that, under the facts and circumstances of this case, the expense of constructing and maintaining said safety contrivances is not an element which can be considered in making up the just compensation to which petitioner is entitled under the constitution and laws of this State. * * * This court has never decided that where the necessity of safety appliances is created some 15 or 20 years after the crossing is made, solely in consequence of changed circumstances and conditions, resulting from the growth of the surrounding territory, that the road whose tracks were first laid, shall be forever exempt from the burden of assisting in constructing and maintaining safety appliances made necessary by such changed conditions."

The injustice to the railroads is not apparent, because by holding them to bear the expense, they are doing no more than the law would clearly require of them if they were now seeking to cross the highway. What is it that causes the danger to travelers upon the highway? Clearly it is not the street cars; it is the trains of the railroad companies. The street car companies by relieving travel, may fairly be held to lessen the danger to otherwise overcrowded streets. Why should the street car company any more than an omnibus line or a stage company, using the same streets, be required to pay for the expense of protecting the public? If it be said that there is danger to travelers upon the steam railway from the street cars, the answer is ready that they are no more dangerous than heavy trucks, van wagons, stages drawn by four or six horses, or other vehicles. The street cars differ only from other methods of travel in that their carriages run upon rails. They have no more rights in going over the streets than other travelers have, except that other travelers are required reasonably to give the cars the right of way. Under the police power these street-car companies are subject to all reasonable rules in running their cars. They may be, and
47 now are, required by law to stop their cars a certain distance from the railroad crossing, and not to cross until some em-

ployee has gone to the railroad track and signalled that the track is clear. The same rule might be required of stage coaches and any other conveyances with heavy loads.

In Du Bois T. P., etc., R. Co. *v.* Buffalo, R., etc. R. Co., *supra*, the complainant, the street railway company, filed its bill in equity to restrain the defendant, steam railway company, from interfering with the construction of its tracks in the public highway across the railway tracks. The defendant used force to prevent the construction. In the suit the defendant claimed that the street railway company should pay damages to the defendant for injury to its business. It was there said: "The respondent holds this right (the use of the street) subject to all the consequences flowing from the ever-increasing travel upon Booth street, and the use of all methods discovered or discoverable for the accommodation of the travel upon the surface of the street; and if the respondent suffers any damages arising from the crossing of its tracks by the public it is of a kind which it must be held to have assumed to itself when it entered upon Franklin street. * * * The crossing of its track by the passenger railway company gives no greater right to damages in the view we take of the case, than it could have if the claim was made against an omnibus line." This case was approved in 149 Pa. St. 1. That case is quoted with approval in C., B. & Q. R. Co. *v.* Steel, 47 Neb. 741, where the authorities are reviewed, and the court holds "that it (the steam railroad company) is presumed to have contemplated the adoption of such improved means of travel as the exigencies of the case require in order to best subserve the public interests and necessities."

In Chicago, etc., R. Co. *v.* Whiting, etc., *supra*, it was held that the street railway company was in the enjoyment of the
48 public easement and use of the street, and that the right of the street railway to cross the tracks of the steam railway was subject to no conditions other than those to which the general public is subject in traveling over such streets. The court said:

"It (the steam railway) never owned its right of way over and across the streets named, free from the burden of the public easement, a part of which belongs to the appellee, the street railway company."

The true rule seems to be that when a railroad company crossing a public street or highway, in the absence of any limitations in its charter, it obtains its right subject to all lawful uses to which the street may be put. It obtains its right subject to the well-known fact that conditions change with the growth of population, and that it itself must meet the expense which these conditions have made necessary for the protection of travelers upon the highway or street.

The learned attorney general seems to concede that were it not for this street railway, the commissioner, under the law and the police power, could place upon these railroads the entire cost of erecting and maintaining these appliances.

As we have shown and held, the street car company is a lawful user of the highway and, as such user, it cannot be selected to pay

the whole or any part of the expense required for the protection of all who travel upon the highway or upon the railroad.

This disposal of the case renders it unnecessary to determine the other questions raised.

Since writing the above I have received the opinion of my brother Moore. The question involved is of such great importance that I feel justified in making a brief reply.

It is well to keep in mind the precise question for our determination. The question is not between two steam railroads crossing each other on private grounds or on the public highway. Neither
49 is it between steam railroads and the entire public using the highway. It is between steam railroads and one user of the public highway,—and the question is who shall pay for the protection of the entire public? or, in other words, can one user of the public highway be required to pay part or all the expense of protecting all users of the highway, and as well those traveling upon the steam road? It must also be borne in mind that no one is seeking to abridge, lessen or destroy the police power of the State to adopt any and all regulations which are necessary to protect the persons and property of those using the highway or the steam road. This power remains the same. The State, either directly or through the municipality, can regulate the speed of street cars within 100, 500 or a 1,000 feet of the crossing. It can compel them to stop at any distance from the crossing. It can regulate the speed of the steam car when approaching. It can, as it now does, compel an employee on the street car to advance to the track before crossing and see whether the crossing is safe. It may compel the steam road to erect gates, etc.

I quote again from Chicago, etc., R. Co. *v.* Whiting, etc.:

"So long, therefore, as it is the settled law of this State that a street railway is not an additional burden to that of the easement the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held the right of such street railway to cross over the tracks of the steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use that street, and the street crossings over its tracks; and it is generally incumbent on such steam railway companies to make such crossings as passable for the general public as they were before the construction of their tracks thereon."

50 The logic of this case and others cited by me upon the same point is, that the street railway is a proper, legitimate and necessary use of the public highway, and that it cannot be made subject to conditions "other than those to which the general public is subject in traveling over the streets." Wherein is the logic of compelling one user of the public highway to pay the whole or part of the expense in protecting all users of the highway against the dangers incident to the passage of long, swift and ponderous trains of steam

cars? It is not the street car which causes the congestion of travel at this point; on the other hand, it relieves the congestion. The congestion is caused by the increase of population,—by vehicles of all sorts, engaged in the transportation of goods and passengers, and as well travelers on foot.

My brother refers to the horseless carriage as probably increasing the danger to those who have the right to travel in the streets. Will it be contended that the owners of horseless carriages could be selected from the owners of other vehicles using the highway and compelled to in part or entirely pay for the expense of gates, etc., at a railroad crossing?

If a cartage company, a corporation, were engaged in the transportation of goods with its heavy trucks and enormous loads over this highway every fifteen minutes or half hour in the day, could it be compelled to pay part or all of the expense to avoid the danger caused by the trains of the steam roads? Many vehicles with their loads are as heavy, and sometimes nearly or quite as large, as ordinary street cars. The tally-hoes, with four or six horses, are certainly as dangerous at these crossings as are the street cars. But for the street cars there would be more conveyances of other character, and more congestion of travel at these crossings; and consequently more danger than results from the use of the street cars.

It is urged that the facts in the cases I have cited are not those of this case, and that the precise question now before us was not involved in them. This is true. The same may be said of the cases cited in my brother's opinion, unless it be the Maine case, to which I will refer hereafter. The question is a new one, and calls for the application of principles to be deduced, so far as possible, from
51 the decided cases, and by the application of sound legal principles.

My brother says:

"If there was no highway at this point traveled by a line of electric railway cars, and by the public, there would be no occasion for the interference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and under the exercise of the police power in the interest of public safety, the State is authorized to interfere through its agent the railroad commissioner." Citing several cases.

Will it be said that if there were no electric cars there would be no necessity of interference by the commissioner or some other authorized body to protect the public and prevent danger? Is the electric car the sole cause of the danger so far as it is caused by the using of the highway? Might not the danger be as great, or even greater, without the street car? The cases cited by my brother relate to fences, cattle-guards, farm crossings, and the like, and do not touch this case. The statement of my brother that "under the exercise of the police power in the interest of public safety, the State is authorized to interfere," is the conceded law. But does that affect the question who shall pay for these safeguards?

The authorities cited, apportioning the expense where one steam

road crosses another, are not, in my judgment, applicable. He quotes extensively from Railroad Company *v.* Railroad Company, 30 Ohio St. 604. I understand the rule laid down in that case is the general rule approved by this court, and is applicable only to steam railroads, whether they cross one another on private grounds or the public highway. It has never been applied to street railways.

I am not aware, as my brother suggests, that street cars in cities are allowed a speed of from 40 to 50 miles per hour. No ordinance so providing has ever been called to my attention. I doubt
52 whether there are as many accidents at street-car crossings from collisions with street cars as with other vehicles. The fact that there are frightful injuries and fatal casualties in the streets of the city, in consequence of collision with street cars, does not affect this question. Those accidents may result from the negligence of travelers, or from the employees of the street car companies, or both; or, from too great a speed allowed by the city, or in violation of the city ordinance. The question we are dealing with is one entirely foreign to those.

Railroad Company *v.* Street Railway Co., 89 Mo. 398, is cited as a case in point. The language quoted by my brother from that case must be read and understood in connection with its facts. The steam-railroad tracks were first laid. The street railway company recognized its duty, when it crossed, to place the necessary crossing frogs at its own expense. That this would be the legal duty of the street railway company would hardly be questioned. These frogs were a part of the track of the street railway, and were necessary in its construction. They had become so worn as to be dangerous. The street railway company claimed that it was the duty of the steam railroad company to replace them, and to make proper provisions for the passage of the electric cars across the tracks of the steam road,—a proposition which could not commend itself to any one's judgment. The railroad commissioners very properly held that the street railway company should bear the expense essential to enable it to cross the defendant's track, and to keep it in repair. No other conclusion, in the exercise of good sense, could have been reached. The syllabus of the opinion reads as follows: "Whenever an alteration is made in an existing railroad track for the sole convenience and accommodation of another railroad, the expense should be borne by the latter." No question of the exercise of the police power was discussed or apparently involved. I am unable to see that that case controls this.

The question before us is not whether the legislature may enact that the expense of crossing similar to this shall be borne in
53 whole or in part by the entire public; nor whether the street car company, in putting its tracks across a steam road, can be compelled to make an overhead crossing at its own expense. We are dealing with a case where the natural growth of public travel, through the increase of trade and population, has made the proposed safeguards necessary for the protection of all,—and where the

attempt is made to make one user of the public highway bear half the expense to the exclusion of all others.

The writ should issue.

C. B. GRANT.

Hooker, J., did not sit.

(Endorsed:) Filed July 2, 1901. Chas. C. Hopkins, clerk supreme court.

54 At a session of the supreme court of the State of Michigan, held at the supreme court room, in the capitol, in the city of Lansing, on the second day of July in the year of our Lord one thousand nine hundred and one.

Present: The Honorable Robert M. Montgomery, chief justice. Frank A. Hooker, Joseph B. Moore, Charles D. Long, Claudius B. Grant, associate justices.

DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent. } No. 18125.

This matter having been heretofore heard upon the petition of relator, and the answer of respondent, and the same having been argued by counsel and duly considered by the court, and it appearing to the court, upon such consideration, that the writ of mandamus as prayed for by relator, ought not to be granted, it is hereby denied, with costs to the respondent, to be taxed.

55 To the Hon. Robert M. Montgomery, chief justice of the supreme court of the State of Michigan:

The petition of the Detroit, Fort Wayne & Belle Isle Railway respectfully shows:

1. That it is the petitioner named in the original and amended petition, as the relator in an action -or writ of mandamus against Chase S. Osborn, railroad commissioner of the State of Michigan heretofore pending, and decided in said supreme court, and that said Chase S. Osborn filed an answer to said petition joining issue, and raising an issue of law, which proceeded to a hearing, and a final judgment in said court.

2. That the rights claimed by the petitioner in its said petition were substantially as follows, namely: That it was the owner of a street railway, in, along and upon Clark avenue in the city of Detroit, which was, and had been for many years, a public street or highway, and that said street railway was constructed and in operation upon said street ever since 1865, under grants from the city of Detroit, and the township of Springwells, the municipal corporation preceding the city of Detroit, and having jurisdiction over the street or highway in question. That subsequently the Wabash Railway Company constructed and maintained a steam or commercial road, with three tracks, operated upon a private right of way across said

highway, and across the track of petitioner. That said Chase S. Osborn, as commissioner of railroads, had directed the installation of safety devices at the crossing in question, and had directed that one-half the cost of installation and maintenance thereof be charged to your petitioner. That said Osborn claimed the power and authority to do so under the provisions of section 5 of an act number 171 of Public Acts of 1893, entitled "An act to regulate the construction of tracks of railroads and street railroads across each other, and the stringing of wires, electric or other over railroad tracks, and relative to the maintenance of such tracks heretofore constructed and wires heretofore so strung."

56 3. The said petitioner in said application, claimed that the said order of said railroad commissioner was invalid, for among other reasons, that it was thereby deprived of its property, franchises and rights, without compensation, and without due process of law, and in controvention of section 10, article 1, of the Constitution of the United States, and also that it was denied the equal protection of the laws in controvention of section 1, of the fourteenth amendment of the Constitution of the United States. That the said court in deciding said cause adversely to this petitioner, denied to it the equal protection of the laws in controvention of section 1, of the fourteenth amendment to the Constitution of the United States, and the rights claimed by your petitioner thereunder, and further denied the right of said petitioner claimed under section 10, of article 1, of the Constitution of the United States in that it was deprived of its property, franchises and rights without compensation, and without due process of law.

4. That on the issue framed therein, said cause went to a final hearing, and the final order and judgment of said court was entered dismissing said petition, and denying the writ of mandamus prayed for, and denying to said petitioner the rights claimed under the Constitution of the United States above set forth.

Your petitioner further shows that said supreme court of Michigan is the court of last resort in said State, and it has no appeal from final judgment of said court to any other court in said State.

Therefore your petitioner respectfully requests that you endorse hereon, or on the draft of the writ of error hereto attached, an order allowing the issuing of a writ of error to remove the record in said cause to the Supreme Court of the United States, for review, in accordance with the provision of section 709 of the Revised

57 Statutes of the United States of 1878; and that a citation may issue, signed by you, directed to said defendant, as required by rule.

And your petitioner will ever pray &c.

July 8, 1901.

THE DETROIT, FORT WAYNE &
BELLE ISLE RAILWAY,
By JOHN C. DONNELLY, *Its Attorney.*

JOHN C. DONNELLY &
M. BRENNAN,
Counsel for Petitioner.

Let a writ of error issue as prayed for in the foregoing petition.

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

July 10th, 1901.

57½ [Endorsed:] Supreme court The Detroit Fort Wayne and Belle Isle Railway pl'ff in error *vs.* Chase S. Osborn commissioner &c. def't in error Petition Filed July 10, 1901 Chas. C. Hopkins clerk John C. Donnelly Michael Brennan, attorneys for pl'ff in error.

58 In the Supreme Court.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads.

In this cause on reading the petition of the said Detroit, Fort Wayne & Belle Isle railway, praying that a writ of error may be allowed to issue in the above-entitled cause, to remove the same to the Supreme Court of the United States for review, which said petition is accompanied by a satisfactory bond as required by the statute, and rule in such case made and provided together with a like bond to the clerk of the Supreme Court of the United States for his fees and also by an assignment of errors, it is ordered that a writ of error, in accordance with the prayer of said petition be and the same is hereby allowed.

[Seal of the Supreme Court of Michigan, Lansing.]

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

July 10th 1901.

58½ [Endorsed:] Supreme court Detroit Fort Wayne & Belle Isle R'y *vs.* Chase S. Osborn Order Brennan, Donnelly & Van de Mark, att'ys for relator, 65 Moffat bldg., Detroit, Mich.

59 *Citation.*

To Chase S. Osborn, commissioner of railroads, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office, of the supreme court of the State of Michigan, wherein The Detroit, Fort Wayne & Belle Isle Railway is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert M. Montgomery, chief justice of

the supreme court of the State of Michigan, this tenth day of July, in the year of our Lord one thousand nine hundred and one.

R. M. MONTGOMERY,
Chief Justice of the Supreme Court of the State of Michigan.

I hereby acknowledge due service on me of a copy of the foregoing citation this tenth day of July, A. D. 1901.

HORACE M. OREN,
Attorney General,
By [name illegible.]

I hereby acknowledge due service on me of a true copy of the foregoing citation on July 10, 1901.

CHASE S. OSBORN,
Commissioner of Railroads,
By HENRY E. CHASE,
Deputy Att'y Gen'l.

59½ [Endorsed:] Supreme court The Detroit Fort Wayne & Belle Isle Railway pl'ff in error *vs.* Chase S. Osborn commissioner def't in error Citation John C. Donnelly Michael Brennan attorneys for pl'ff in error.

60 THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent.

STATE OF MICHIGAN, *County of Wayne,* } *ss:*

Julian H. Harris being duly sworn deposes and says that on the tenth day of July, 1901, he served upon Horace M. Oren, attorney for Chase S. Osborn, defendant in error and attorney general of the State of Michigan, by leaving the same with Henry E. Chase, deputy attorney general, then in charge of the office of the said Oren, at Lansing, Michigan, as attorney for Chase S. Osborn, commissioner of railroads of the State of Michigan, a copy of the citation in the above-entitled cause of which the within is a copy, commanding the said Chase S. Osborn, commissioner as aforesaid, to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date of said citation, and which citation is dated the 10th day of July, 1901, and signed by R. M. Montgomery, chief justice of the supreme court of the State of Michigan.

JULIAN H. HARRIS.

Subscribed and sworn to before me this 11th day of July, 1901.

ALEXANDER MUNRO,
Notary Public, Wayne County, Michigan.

[Seal Alexander Munro, Notary Public, Wayne County, Mich.]

61 (Copy.)

Citation.

To Chase S. Osborn, commissioner of railroads, greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the State of Michigan, wherein The Detroit, Fort Wayne & Belle Isle Railway is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Robert M. Montgomery, chief justice of the supreme court of the State of Michigan, this tenth day of July in the year of our Lord one thousand nine hundred and one.

(Signed) R. M. MONTGOMERY,
Chief Justice of the Supreme Court of the State of Michigan.

61½ [Endorsed:] Supreme court. Detroit, Fort Wayne & Belle Isle Railway, plaintiff in error *vs.* Chase S. Osborn, commissioner, defendant in error. Proof of service of citation. Filed Jul 12, 1901. Chas. C. Hopkins, clerk supreme court. John C. Donnelly, Michael Brennan, att'ys for pl'ff in error.

62 (Copy.)

Bond.

Know all men by these presents, that we, The Detroit, Fort Wayne & Belle Isle Railway, a corporation organized under the laws of Michigan, as principal, and Michael Brennan and John C. Donnelly, of Detroit, Michigan, as sureties, are held and firmly bound unto Chase S. Osborn, commissioner of railroads, in the full sum of five hundred dollars, to — *pay* to the said Chase S. Osborn, commissioner of railroads, or his certain attorney, executor, administrator, successor or assign to which payment well and truly to be made we bind ourselves, our heirs, administrators and successors, jointly and severally by these presents.

Sealed with our seals and dated this tenth day of July, 1901.

Whereas, lately at a session of the supreme court of the State of Michigan, in a suit pending in said court, in which said principal obligor was petitioner and relator, and the said obligee was the defendant and respondent, a final judgment was rendered against the said petitioner and relator denying the relief prayed for in the said petition, and said principal obligor having obtained a writ of error, and having filed the same in the office of the clerk of this court, to reverse the said final judgment aforesaid, and the citation directed to the said Chase S. Osborn, commissioner of railroads, citing and

admonishing him to be and appear in the Supreme Court of the United States — be holden at Washington, on the second Monday of October next, was duly issued.

Now the condition of the above obligation is such that if the said Detroit, Fort Wayne & Belle Isle railway shall prosecute its said writ of error to effect and answer *of* damages and costs if it fails to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

DETROIT, FORT WAYNE & BELLE ISLE RAILWAY,
By MICHAEL BRENNAN, *President.*
MICHAEL BRENNAN.
JOHN C. DONNELLY.

Signed sealed and delivered in the presence of—
STEWART O. VAN DE MARK.
JOHN H. HARRIS.

63 STATE OF MICHIGAN, } ss:
County of Wayne, }

M. Brennan and John C. Donnelly being each duly sworn doth each for himself depose and say that he is worth the sum of five hundred dollars in property subject to execution over and above all debts, dues and demands and exemptions.

MICHAEL BRENNAN.
JOHN C. DONNELLY.

Subscribed and sworn to before me this 10th day of July, 1901.
JOHN H. HARRIS,
Notary Public, Wayne County, Mich.

I hereby approve of the foregoing bond and the sureties thereon. July 10th, 1901.
R. M. MONTGOMERY,
Chief Justice of the Supreme Court of Michigan.

(Endorsed:) Filed July 10, 1901 Chas. C. Hopkins, clerk.

64 *Bond to Clerk Supreme Court United States.*

Know all men by these presents, that we, The Detroit Fort Wayne and Belle Isle Railway, a corporation organized and existing under and by virtue of the laws of the State of Michigan, as principal, and Michael Brennan and John C. Donnelly, as sureties, all of the city of Detroit, county of Wayne and State of Michigan, are held and firmly bound unto James H. McKenney, clerk of the Supreme Court of the United States, in the full and just sum of two hundred dollars ($200), current money of the United States, to be paid to the said James H. McKenney, his heirs, executors, administrators or assigns; to which payment well and truly to be made, we bind our-

selves, our heirs, executors, administrators successors and assigns, jointly and severally firmly by these presents.

Sealed, with our seals and dated this tenth day of July, in the year of our Lord one thousand nine hundred and one.

Whereas, lately at a session of the supreme court of the State of Michigan, in a suit depending in said court, between The Detroit Fort Wayne and Belle Isle Railway, relator, and Chase S. Osborn, commissioner of railroads, as respondent, a final judgment was rendered against said relator, denying the relief prayed for in said relator's petition, and the said Detroit Fort Wayne and Belle Isle Railway, relator as aforesaid, having obtained a writ of error to remove the said cause to the Supreme Court of the United States, and filed a transcript of the record of said court in said cause in the office of the clerk of the Supreme Court of the United States to reverse the judgment in the aforesaid suit:

Now, the condition of the above obligation is such, that if the said obligors shall well and truly pay or cause to be paid to the said James H. McKenney, his heirs, executors, administrators or assigns, all such fees as shall accrue to him the said James H. McKenney, clerk as aforesaid, and charged to the said The Detroit Fort Wayne and Belle Isle Railway, in the prosecution of the said writ of
65 error, then the above obligation to be void, otherwise to remain in full force and virtue.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY,
By MICHAEL BRENNAN, *President.*
MICHAEL BRENNAN. [L. S.]
JOHN C. DONNELLY. [L. S.]

Signed sealed and delivered in the presence of.

ALEXANDER MUNRO.
LEOPOLD A. KOSCINSKI.

STATE OF MICHIGAN, } ss:
County of Wayne, }

Michael Brennan and John C. Donnelly, sureties upon the foregoing bond, being duly sworn, doth each for himself depose and say that he is a resident and freeholder of the county of Wayne and State of Michigan, and is possessed of property of the value of over two hundred dollars over and above all incumbrances, indebtedness and exemptions from sale on execution, and all liability on other similar bonds, and that he has signed the foregoing bond.

MICHAEL BRENNAN.
JOHN C. DONNELLY.

Subscribed and sworn to before me this tenth day of July A. D. 1901.

ALEXANDER MUNRO,
Notary Public, Wayne County, Michigan.

I hereby approve the foregoing bond.
July 10 1901.

R. M. MONTGOMERY,
Chief Justice.

65½ [Endorsed:] #18125 Supreme court The Detroit, Fort Wayne & Belle Isle Railway pl'ff in error *vs.* Chase S. Osborn commissioner &c. def't in error Bond. Filed July 10, 1901 Chas. C. Hopkins clerk John C. Donnelly Michael Brennan attorneys for pl'ff in error.

66 Supreme Court of the United States.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Defendant in Error.

Assignments of Error.

Now comes said plaintiff in error, and says that the supreme court of the State of Michigan was in error in its judgment in said cause, as follows, to wit:

1. Said court erred in refusing to grant and cause to be issued a writ of mandamus prayed for from the petition of the plaintiff in error, and requiring the said respondent to modify his order as set forth in said petition.

2. Said supreme court of the State of Michigan erred in holding and deciding that the provisions of act number 171 of the Public Acts of 1893 of the State of Michigan, entitled "An act to regulate the construction of tracks of railroads and street railroads across each other, and the stringing of wires, electric or other over railroad tracks, and relative to the maintenance of such tracks heretofore constructed, and wires heretofore so strung," were valid in so far as they authorize the defendant in error, The Commissioner of Railroads to make the order complained of in this case, requiring the plaintiff in error to bear a certain proportion of the cost of installing and maintaining safety devices at the crossing on Clark avenue mentioned in the petition, as valid and constitutional.

67 3. Said supreme court of the State of Michigan erred in holding and deciding that the action of the commissioner under said statute was valid; that said act was constitutional and valid, and that the action of said defendant thereunder was not in violation of the constitutional rights of the plaintiff in error, and that said plaintiff in error was not thereby deprived of its property, franchises and rights without compensation, and without due process of law, in controvention of section 10, article 1 of the Constitution of the United States.

4. The said supreme court of the State of Michigan erred in holding and deciding that the provision of said act number 171, above

entitled, and the order of the said defendant as commissioner of railroads of the State of Michigan do not operate as a denial to said plaintiff in error of the equal protection of the laws in contravention of section 1, of the fourteenth amendment to the Constitution of the United States.

5. The said supreme court of the State of Michigan erred in holding and deciding that the said plaintiff in error was not entitled to have issued and enforced, a writ of mandamus against the defendant, as prayed for in his said petition.

6. The said supreme court of Michigan erred in holding and deciding that the occupation and use of the highway by the Detroit, Fort Wayne & Belle Isle railway for street railway purposes was of such a character that the legislature of the State of Michigan could authorize the defendant to single it out from all other occupants and users of the highway, and impose upon it the expense and burden of erecting and maintaining safety devices, as attempted in his said order; such holding and decision being in effect denying to the said Detroit, Fort Wayne & Belle Isle railway the equal protection of the laws, and an impairment of the obligation of its contract for the use of said highway, inasmuch as it violated the well-settled rule of law that the use made by said Detroit, Fort Wayne & Belle Isle railway of the highway was not an additional burden on the easement, but was in furtherance of the purposes for which the street was established and maintained.

Therefore the said plaintiff in error prays that the judgment of the supreme court of the State of Michigan may be reversed, and that said court be directed to issue a writ of mandamus prayed for by the said plaintiff in error.

JOHN C. DONNELLY &
MICHAEL BRENNAN,
Attorneys for Plaintiff in Error.

July 10, 1901.

67½ [Endorsed:] Supreme Court of the United States. Detroit Fort Wayne & Belle Isle R'y pl'ff in error *vs.* Chase S. Osborn def't in error Assignments of error John C. Donnelly Michael Brennan att'ys for pl'ff in error 65 Moffat bldg., Detroit, Mich.

68 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Michigan, Greeting:

Because in the record and proceedings as also in the rendition of the judgment of a plea which is in the said supreme court before you, or some of you, being the highest court of law or equity of the said State, in which a decision could be had in the said suit between The Detroit, Fort Wayne & Belle Isle Railway, relator, and Chase S. Osborn, commissioner of railroads, respondent, wherein was drawn in question the validity of a treaty or statute of or an

authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of the statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty or statute or, or commission held under, the United States, and the decision was granted against the title, right, privilege, or exemption specially set up or planned under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened to the great damage of the said relator as by its complaint appears, we being willing, that error if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning same to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the tenth day of July, in the year of our Lord one thousand nine hundred and one.

[Seal of the Circuit Court, Eastern District of Michigan.]

WALTER S. HARSHA,
Clerk of the U. S. *Circuit Court of the United States for the Eastern District of Michigan.*

Allowed by
R. M. MONTGOMERY,
Chief Justice Supreme Court of Michigan.

[Endorsed:] Supreme Court of the United States The Detroit Fort Wayne & Belle Isle Railway plaintiff in error *vs.* Chase S. Osborn commissioner &c. defendant in error Writ of error. Filed July 10, 1901 Chas. C. Hopkins clerk sup. ct. of Mich. John C. Donnelly & Michael Brennan attorneys for pl'ff in error.

The execution of the within writ appears by transcript of record hereto annexed.

Dated July 17, 1901

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of Michigan.

69 *Copy of Journal Entries.*

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILway, Relator,
vs.
THE COMMISSIONER OF RAILROADS, Respondent. } No. 18125.

Brennan, Donnelly & Van de Mark, attorneys for relator.
Horace M. Oren, attorney general, attorney for respondent.

Journal.	Date.	Proceedings.
	1900.	
	April 4	Petition filed.
Q. 64.....	April 11	Order allowed, set May 1, 1900.
	May 1	Answer filed.
	May 7	Note of argument filed.
	Aug. 31	Note of argument filed.
	Dec. 11	Application for leave to amend petition filed.
	1901.	
	Jan. 5	Amended petition filed.
	Jan. 9	Stipulation filed.
Q. 325...	Jan. 9	Order entered.
Q. 326...	Jan. 9	Argued and submitted.
	July 2	Denied with costs; opinion filed.
	July 10	Petition for writ of error filed.
	July 10	Writ of error allowed and filed.
	July 10	Bond filed.
	July 17	Return made to writ of error.

70 Supreme Court of the State of Michigan.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, Relator and Plaintiff in Error,
vs.
CHASE S. OSBORN, Commissioner of Railroads, Respondent and Defendant in Error.

STATE OF MICHIGAN, } ss:
In the Supreme Court, }

I, Charles C. Hopkins, clerk of the supreme court of the State of Michigan, do hereby certify that the annexed and foregoing is a true and correct copy of the record and of all proceedings had and entered in the above-entitled cause by said court, including the written decision and reasons therefor, signed by the judges of said

court, and filed in my office, as appears of record and on file in said cause; that I have compared the same with the original, and it is a true transcript therefrom and of the whole thereof; that attached thereto are the petition for allowance of writ of error, order allowing the writ, citation with acceptance of service endorsed thereon, a copy of the bond to the adverse party, duly approved, the bond to the clerk of the Supreme Court United States, duly approved, the assignment of errors in the Supreme Court of the United States, and the writ of error with allowance endorsed thereon.

In testimony whereof I have hereunto set my hand and affixed the seal of said supreme court, at Lansing, this seventeenth day of July in the year of our Lord one thousand nine hundred and one.

[Seal of the Supreme Court of Michigan, Lansing.]

CHAS. C. HOPKINS,
Clerk Supreme Court of the State of Michigan.

Endorsed on cover: File No. 18,232. Michigan supreme court. Term No. 139. The Detroit, Fort Wayne and Belle Isle Railway, plaintiff in error, *vs.* Chase S. Osborn, commissioner of railroads. Filed July 20", 1901.

No. 139.

FILED
NOV 17 1902
JAMES H. McKENNEY
Clerk

Brf. of Donnelly & Brennan

Supreme Court of the United States

Filed Nov. 17, 1902.

THE DETROIT, FORT WAYNE & BELLE ISLE RAILWAY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS, DEFENDANT IN ERROR.

October term, 1902. No. 139.

In Error to the Supreme Court of the State of Michigan.

BRIEF FOR PLAINTIFF IN ERROR

and

POINTS ON MOTION TO DISMISS OR AFFIRM.

JOHN C. DONNELLY,
MICHAEL BRENNAN,
Counsel for Plaintiff in Error.

DETROIT:
Record Printing Co., Free Press Bldg., 11 and 13 Lafayette Ave.
1902.

10323

Supreme Court of the United States

DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, PLAINTIFF IN ERROR.

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS, DEFENDANT IN ERROR.

October term, 1902. No. 139.

BRIEF FOR PLAINTIFF IN ERROR.

I.

This case involves the question of the validity of certain provisions of an Act of the Legislature of the State of Michigan, and the power of the Railroad Commissioner of the State, acting under such provisions, to impose upon the plaintiff in error the burden of installing and maintaining certain gates and other safety crossing devices at a crossing of the tracks of the plaintiff in error by a steam railroad, and the questions arise upon the following facts: The plaintiff in error is a street railway company, pure and simple, and organized under the provisions of Chapter 95, Howell's Annotated Statutes of Michigan, providing for the incorporation of street railway companies, and owned and owns and operates a street railway in the City of Detroit, and, among other streets, on Clark Avenue in said city. It is the successor in such ownership and operation of a company known as the Fort Street and Elmwood Avenue Railway, which was also a street railway corporation. The street railroad was constructed on Clark Avenue in 1866 under certain municipal grants by which the predecessor company obtained the right to construct, maintain and operate its line of street railway in said street

and immediately thereafter constructed and put its road in operation. The grant was the ordinary street railroad grant. There was no public highway or street crossing on Clark Avenue when the street railroad was constructed between what is known as the River Road and Fort Street, nor was there any railroad or other crossing for a number of years thereafter.

In 1883 the Wabash Railway Company, as it is familiarly known, approached Clark Avenue on the private right of way acquired by it, and constructed its track across Clark Avenue at the point in question, proceeding thence to the center of the city. No safety devices of any character were then installed by the Wabash Railroad Company, though it was the junior company. Subsequently, the steam railroad tracks at the crossing in question were increased to three. The Union Depot was built at the Wabash terminus in the center of the city, for the accommodation of three of four important steam railroads entering the city, and what was known as the Union Terminal Association obtained control of the tracks crossing Clark Avenue, and the steam railroad business had so increased in volume that thirty-eight steam railroad passenger trains per day were crossing over Clark Avenue at this point at time the Commissioner made the order in question. The street railroad of the plaintiff in error some time before the steam railroad was built, was changed from a single to a double track. The section of the city in the neighborhood has increased somewhat in density of population and there has been a considerable increase of travel on the streets.

The foregoing facts are stated in the amended petition contained on pages 11 to 17 of the Record, and in an agreed Statement of Facts commencing at the bottom of page 17 to the top of page 18 of the Record.

II.

In 1889 the Legislature passed an Act requiring all street railway cars to be stopped before going upon a street railway crossing of a steam railway track and requiring the man in charge of the car to see whether any train was approaching on the steam railway before crossing. It forms Sec. 32 of the Street Railway Act. In 1893 the State Legislature passed an Act entitled "An Act to regulate the construction of the tracks of railroads and street railroads across each other, and the stringing of wires, elec-

tric or other, over railroad tracks, and relative to the maintenance of such tracks heretofore so constructed and wires heretofore so strung." The Act contains seven sections, as follows:

The people of the State of Michigan enact:

(361) 6349. Section 1. That it shall hereafter be unlawful for any railroad company to construct its tracks across the tracks of any street railroad, or for any street railroad company, whether operated by horses, cable, electricity, or other motive power, to construct its tracks across the tracks of any railroad company until the place where and the manner in which such crossing shall be made shall have been approved by the Commissioner of Railroads.

(362) 6350. Section 2. Any railroad company or street railroad company desiring to make any such crossing shall give the company whose tracks are to be crossed notice in writing of the place where and the manner in which it desires to make such crossing, and the place where and the time when it will apply to the Commissioner of Railroads for approval thereof, which notice shall be served at least ten days before the hearing of the proposed application.

363) 6351. Section 3. Such crossings shall, in all cases where the Commissioner of Railroads deems it reasonably practicable, be made otherwise than at grade, and in accordance with plans to be approved by said Commissioner; and when made at grade said Commissioner shall prescribe the safeguards which shall be provided by the company desiring to make such crossing, to prevent accidents thereat.

(364) 6352. Section 4. It shall hereafter be unlawful for any corporation or person to string any wire, electrical or other, over the tracks of any railroad company, except at such places and in such manner as shall be approved by the Commissioner of Railroads, and any corporation or person desiring to so string any wire shall give the railroad company notice in writing of the place where and the manner in which it desires to string the same, and the place where and the time when it will apply to the Commissioner of Railroads for his approval as above required, which notice shall be served at least ten days before the time of hearing of such application.

(365) 6353. Section 5. The Commissioner of Railroads shall, as soon as possible after the passage of this

Act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable.

(366) 6354. Section 6. Said Commissioner shall also, as soon as possible after the passage of this Act, either by personal examination or otherwise, obtain information as to all places where the tracks of railroads are crossed by wires strung over said tracks, and wherever, in his judgment, such wires should be raised to a greater height or other thing done with reference thereto, to guard against accidents, he shall order such change or changes to be made, and shall apportion any expense incident thereto between the companies or persons affected as he may deem just and reasonable; Provided, That in no case shall the height of any wire strung across such railroad (tracks) track be less than twenty-two feet from the established grade of said railroad tracks.

(367) 6355. Section 7. It shall be the duty of every corporation and person to whom an order made by the Commissioner of Railroads under this Act shall be directed, to comply with such order in accordance with its terms, and for any neglect to so comply therewith any such corporation or person shall be liable to a penalty of one hundred dollars and to a like penalty for every ten days during which said neglect shall continue. Any such penalty may be recovered in an action of assumpsit brought in the name of the people of this State, and it shall be the duty of the prosecuting attorney of the proper county to bring any such action at the request of the Commissioner of Railroads.

Approved May 31, 1893."

This Act has continued in force from the date of its passage. Some time prior to the 7th of March, 1900, the Common Council of the City of Detroit applied to the Commissioner of Railroads for an installation of additional protection at the Clark Avenue crossing of the tracks of the Union Terminal Association, being the tracks in question, and, pursuant to such application, the Railroad Commissioner personally inspected the premises, and after such inspection made the order complained of in this case, which will be found on pages 7 and 8 of the Record. It

will be noted that this order was made upon the application of the city authorities without referring in any way to the plaintiff in error, and referring solely to the tracks of the Union Terminal Association and the street crossing, and it will be further noted that the order recites only that the Commissioner heard the city officials of Detroit and the arguments of the attorneys and representatives of the Union Terminal Railroad at the inspection. The order seeks to impose one-half the cost of installing and maintaining the safety appliances upon the plaintiff in error, and paragraph 5 of the answer of the defendant in error, found on pages 9 and 10 of the Record, distinctly bases the authority for the order in question upon Section 5 of the Act above quoted.

While it is true that the plaintiff in error was informed of the inspection, and the manager simply appeared to object, yet it is evident from the tenor of the order that the Railroad Commissioner did not, so far as any hearing was concerned, consider the street railroad company, or anybody else, as entitled to notice, and the order does not recite that any notice was given. The section in question does not provide for any notice or hearing.

It is to be further noted that the defendant in error bases its decision upon the requirements of public interests and the additional protection at the crossing of the Union Terminal Association tracks and Clark Avenue. The plaintiff in error sought to have the order of the Railroad Commissioner set aside or modified by a writ of mandamus from the Supreme Court of the State.

III.

The grounds upon which the validity of the order was attacked were:

(a) That it was the settled constitutional law of Michigan that the street railroad does not constitute an additional burden upon the highway, but is simply a method of using the highway for public travel and in direct furtherance of the purpose for which the highway was established; that the street railroad company in contemplation of the law bears no different relation to the highway than that of any other person using the highway for the moving of vehicles or for any other method of public or private travel, and cannot, as between others using the highway for like purposes, be required alone to

bear the expense of installing and maintaining safety devices at steam railroad crossings designed for the protection of all the traveling public.

(b) And as a further principle well established in Michigan the junior road seeking to cross another, and consequently the primary cause of such danger as may arise from such crossing, cannot shift any portion of the burden of maintaining safety devices and appliances upon the senior road without compensation, and that this doctrine must apply, even though at the time the crossing was first made the senior road did not insist upon the installation of safety crossing devices, though the law required it; that the dangerous condition which arose from the construction of steam railroad tracks was in the nature of a nuisance created by the steam railroad company, and which must be bound to take the necessary precaution to prevent accidents, and it mattered not whether the danger existed at the time of the building of the steam railroad tracks or arose afterwards from an increase in the number of tracks or a great increase in the use of the tracks.

(c) The provisions of the Michigan statute which in terms conferred the jurisdiction upon the Railroad Commissioner to make the order in question is unconstitutional and void because it did not constitute due process of law, the particular objection being that the law does not require that the Railroad Commissioner, either in the investigation or inspection of the crossing, or in the fixing of the safety appliances to be installed, *or the adjudication as to the persons who shall bear the expense thereof,* shall give notice to the parties and grant any hearing; that requiring the street railroad company to pay a very large annual expense without the law requiring the officer to give notice and give a hearing, is not due process of law within the meaning of the constitutional provisions and the decisions; that it matters not that the Commissioner may have attempted to give notice or may have had an informal hearing at which the defendants may or may not have appeared, and in which they may or may not have participated, is not sufficient. There must be authority derived from the statute requiring notice and hearing, otherwise it is void. These points were urged. Two opinions were filed by the Supreme Court of the State; the one, that of the bare majority of the court, fairly follows the argument in support of thq position of the counsel for the defendant in error upon the first question.

The opinion of the minority of the court strongly supports the propositions contended for by counsel for the

plaintiff in error. These opinions are found on pages 19 to 36 of the Record.

IV.

ERRORS ASSIGNED.

It is submitted that the Supreme Court erred, First, in holding that, in the exercise of its police power, the State, acting through its Commissioner of Railroads, could require the street railroad company, under the facts and circumstances in this case, to bear one-half of the cost of maintaining and operating the safety devices and appliances, and could make and enforce the order complained of in this case; Second, the State Supreme Court further was in error in not holding that the statutory provision under which the defendant in error assumed jurisdiction and entered the order complained of was in violation of the provision of the Federal Constitution, especially of Section 10, Article 1, of the Constitution of the United States, and that the order deprived the plaintiff in error of its property, franchise and rights without compensation and without due process of law.

Third, in holding and deciding that the statutory provisions in question and the acts of the Railroad Commissioner thereunder were not invalid as denying to the plaintiff in error the equal protection of the laws, in contravention of Section 1 of the Fourteenth Amendment of the Constitution of the United States.

V.

THE STATUTE OF MICHIGAN, SECTION 5 OF WHICH IS CLAIMED BY THE DEFENDANT IN ERROR TO CONFER THE AUTHORITY UPON HIM TO EXERCISE THE JURISDICTION ASSUMED TO BE EXERCISED AND TO IMPOSE UPON THE PLAINTIFF IN ERROR THE COST OF MAINTAINING AND OPERATING SAFETY APPLIANCES AT THE CROSSING IN QUESTION, IS UNCONSTITUTIONAL AND VOID BECAUSE IT DOES NOT REQUIRE ANY NOTICE TO BE GIVEN TO THE STREET RAILWAY OR TO ANY OF THE INTERESTED PARTIES, OR REQUIRE THE RAILROAD COMMISSIONER TO GIVE NOTICE TO THE PARTIES OR GIVE THEM A HEARING ON THE QUESTION AS TO WHAT SAFE-

TY APPLIANCES SHOULD BE INSTALLED AND MAINTAINED, OR UPON WHOM THE WHOLE OR ANY PORTION OF THE COST OF INSTALLING, MAINTAINING AND OPERATING THE SAME SHOULD BE IMPOSED.

The attention of the Court is invited to the provisions of the statute. It will be noted that the first four sections of the Act provide for the exercise of the authority of the Railroad Commissioner in a class of cases essentially different from the case at bar; that is to say, it specifically provides for the method of procedure and the extent of the jurisdiction and the power of the Railroad Commissioner, with reference to crossings not yet made, but which it is proposed to make, and so far as the rights of crossing steam and street railroads are concerned and the authority of the Railroad Commissioner in regard to same, the statute when passed was purely prospective, and refers to crossings constructed after passage of the Act.

Section 1 of the Act provides that after its passage it will be unlawful for any railroad company to construct its tracks across any street railway or for any street railway company to construct its tracks across the tracks of any railroad company until the place where and the manner in which said crossings shall be made shall have been approved by the Commissioner of Railroads.

Section 2 provides that the railroad or street railroad desiring to make a crossing shall give the company whose tracks are to be crossed a written notice of the place where and the manner in which it desires to make such crossing, and the place where and the time when it will apply to the Railroad Commissioner for approval thereof, which notice shall be served at least ten days before the hearing of the application.

Section 3 provides that in all cases where the Commissioner of Railroads deems it reasonably practicable, crossings shall be made otherwise than at grade, according to plans to be approved by the Commissioner, and when the crossing is to be made at grade the Commissioner shall prescribe safeguards, *which shall be provided by the company desiring to make such crossing.*

Section 4 makes it unlawful for any company to string any wire, electrical or other, over the tracks of any railroad company except in such manner as shall be approved by the Railroad Commissioner, and the company desiring to so string wire shall give the Railroad Commissioner no-

tice in writing of the place where and the manner in which it desires to string the same, and the place where and the time when it will apply to the Commissioner of Railroads for his approval, as above required, which notice shall be served at least ten days before the time of hearing such application.

It will thus be noted that the first four sections provide for the method by which the junior crossing company shall institute proceedings to obtain the right to make a crossing and to invoke the authority and bring into exercise the jurisdiction of the Railroad Commissioner under the Act to determine the nature of the crossing, as to whether it will be a crossing at grade or otherwise, and the nature of the safety appliances to be installed, and specifically requires that the junior or crossing company shall provide such safety appliances. It, in express terms, requires not less than ten days' notice of the place and character of the crossing desired and the time and place where the matter will be submitted to the adjudication of the Railroad Commissioner, but requires that the notice shall come from the moving party, and such notice might be characterized as the institution by the moving party, by proper notice to the senior company, of a quasi judicial proceeding, thus bringing it within due process of law.

The examination of the remaining three sections of the statute shows that they are intended to apply to crossings in existence at the time of the passage of the Act. Section 5 is as follows:

> The Commissioner of Railroads shall, as soon as possible after the passage of this Act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; *and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable.*

The crossing in question having been made prior to the passage of this Act, this section, if valid, applies thereto, and defendant in error states it to be the authority under which he assumed to act. (Ans. §5, pp. 9-10, Rec.)

Section 6 provides that the Commissioner shall also, as soon as possible after the passage of the Act, either by personal examination or otherwise, obtain information as to all places where the tracks of railroads are crossed by wires strung over said tracks, and wherever in his judgment such wires should be raised to a greater height, or other thing done with reference thereto to guard against accidents, he shall order such change or changes to be made and shall apportion any expense incident thereto between the companies or persons affected as he may deem just and reasonable, provided that wires shall be strung not less than 22 feet above the established grade of the railroad track.

Section 7 of the Act simply contains the penal provisions to be applied in case of the failure or refusal of the company or companies to comply with the order of the Commissioner.

It will thus be seen that two clearly distinct classes of cases are provided for by the Act—first, crossings sought to be made after the passage of the Act, in which the jurisdiction of the Commissioner is exercised only when it is invoked by proper application and proceedings upon the part of the junior or crossing company, the whole duty of giving notice and prosecuting the proceedings to a final determination before the Commissioner resting upon the moving company. No obligation is imposed upon the Commissioner to give any notice to the parties, though the validity of his acts would no doubt depend upon the moving company having complied with the provisions of the statute requiring notice to be given to the senior company. Second, cases where the crossings were in existence at the time of the passage of the Act, and where the investigation is one to be commenced and carried to a conclusion on the motion of the Railroad Commissioner himself. While it is true that the Railroad Commissioner may be induced by the representatives of third persons, as in this case by the municipal authorities of Detroit, to exercise the jurisdiction conferred by Section 5 in the class of cases coming within its scope, yet that does not change the nature of the proceeding or in any way alter the legal significance of the section. The case must be treated as though the proceeding was one in which the Railroad Commissioner on his own motion sought to exercise the jurisdiction conferred by the section. The cases coming within the scope of this section are of a wholly different character from those coming within the provisions of the first four sections of the

Act. Those coming under the first four sections are different not only as to the method pointed out by the statute by which the adjudication may be brought about and imposing upon the crossing and junior company the necessity for invoking the jurisdiction of the Railroad Commissioner, but also in the important particulars that ample notice is required to be given by the moving company, and further in the specific requirement that the safety appliances which the Commissioner determines shall be necessary at the hearing shall be provided by the junior crossing company.

In short, the statute provides in this class of cases for a regularly instituted and prosecuted hearing and an investigation quasi judicial in its character, with all parties interested before the quasi judicial officer who is empowered by the statute to determine the questions involved; whereas, as to the cases coming under Section 5, there is an utter absence of any such requirement. The whole matter is left to the arbitrary action and independent investigation of the Railroad Commissioner, not only on the question of the necessity for the installation of safety devices, but also as to the distribution between the two companies of the cost of installing, maintaining and operating such safety appliances. There is absolutely no provision in the statute, in either class of cases, requiring the Railroad Commissioner to give notice so that there would be no implied requirement that notice should be given in the second class of cases. As further enforcing the view of this section, attention is specifically directed to the provision of Section 6, which applies to cases where wires have been strung prior to the passage of the Act, and in which also there is an utter absence of any requirement of notice.

It is the well settled law that where the public officer is given authority to determine that certain things should be done in the interests of public safety, and if the officer is given the further authority to impose the cost thereof upon certain individuals who are bound by his action, the matter is quasi judicial in its character, and if the law does not in express terms, or by necessary implication arising from the language of the Act itself, grant to the party against whom the judgment is rendered the right to a hearing before condemnation, such a proceeding and judgment amounts to a deprivation of property without due process of law within the meaning of the constitutional provision.

The leading cases in support of this proposition are:

Garvin vs. Daussman, 114 Ind., 429.
Kuntz vs. Sumption, 2 L. R. A. (Ind.), 655.
Stuart vs. Palmer, 74 N. Y., 183.
Ulman vs. Baltimore, 11 L. R. A., 224.
Mayor vs. Scharf, 54 Maryland, 499.
Baltimore vs. Johns Hopkins Hospital, 56 Md., 1.
Spencer vs. Merchant, 125 U. S., 345.
Whitford vs. Probate Judge, 53 Mich., 130.
Paulson vs. City of Portland, 149 U. S., 129.
The Railroad Tax cases. County of San Mateo vs. Southern Pacific R. Co., 13 Fed. Rep., 22. Decision of Justice Field.
The Sonoma county Tax case. San Francisco & N. R. Co. vs. Dinwiddie et al., 13 Fed. Rep., 789.
Burns vs. Multnomach R. C., 15 Fed. Rep., 183.
County of Santa Clara vs. Southern Pacific R. Co., 18 Fed. Rep., 410.
Seifert vs. Brooks, 34 Wis., 443.
State ex rel. Flint vs. Fond du Lac, 42 Wis., 287.

The language of Chief Justice Cooley in Whiteford vs. Probate Judge, supra, is significant. He states:

> "I agree entirely that the proceedings in this case are altogether void. I do not think it legally competent to confer upon the Probate or any other court the power, without notice to the parties concerned, to appoint an officer to decide finally upon the question of laying taxes and to proceed to lay taxes in its discretion, as has been done here, and if the legislation under which this so-called Drain Commissioner has proceeded will permit of such action, it is void."

In that case the court had under consideration a statute authorizing the appointment of a Drain Commissioner with authority to lay out a drain and determine the district upon which the cost should be a charge, which did not provide for notice to the persons owning the property upon which the burden was to be laid.

The case of Seifert vs. Brooks, 34 Wis., 443, strongly sustains our view. In that case it appeared that the statute did not provide for notice in certain proceedings for the opening of a street. It appeared that, in fact, the party complaining had been notified of the time and place for the assembling of the jury, and was present, but took no part in the proceedings. The court held the proceedings void

because of the absence of any provision in the statute requiring the notice in question to be given. In disposing of the question, on page 448, the court says:

> "In Lumsden vs. Milwaukee, supra, where the Act was held unconstitutional because it did not provide that the jury should be sworn before acting, it was likewise decided that the fact that they were actually sworn did not aid their acts or render them any more valid than if they had acted without oath. It is not seen, therefore, how, if the plaintiff had been notified of the time and place of meeting, or if he had been present at such time and place, but taking no part, either circumstance could have availed to cure the defect or render the proceedings of any validity. It is the omission or unconstitutional feature in the statute which vitiates, and that can be cured only by the legislature itself, or, in particular cases, it may be by the waiver or voluntary abandonment of his constitutional rights by the land owner, who has that power."

As noted above, the particular objection was that the statute failed to require notice to be given of the time and place of the assembling of the jury. It will be further noted in this decision that the objection was made by a person whose land was not taken, but whom it was sought to charge with a portion of the expense of opening the street. This case was followed in Wisconsin by a number of others, and notably in State ex rel. Flint vs. City of Fond Du Lac, supra. The court says:

> "But we think the proceedings were fatally defective because the charter makes no provision for giving a proper notice to the owner of the time and place for the appointment and meeting of the jury which determines the necessity of taking his property."

After discussing the matter at some length, the court says, on page 299:

> "It follows from these views that, on account of the failure of the charter to provide for the giving of personal notice to the owner of the property of the time and place of the appointment and meeting of the jury to inquire into and determine the necessity, the proceedings were void, and were properly vacated by the Circuit Court."

In Garvin vs. Daussman, 114 Ind., 429, the Court says:

> "It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice."

In Kuntz vs. Sumption, 2 L. R. A., 655, it was held that a statute authorizing a board of equalization to increase the valuation of the property of an individual taxpayer listed by him for taxation was unconstitutional because there was no provision for notice. The action of the Commissioner is not rendered valid because he supplemented the statute by a notice and hearing which he was not required nor authorized by the statute to give. As was said in the case last cited, "Without a law authorizing notice, there can be none."

"The ultimate conclusion which we reach is that where a conclusive decision is authorized the statute itself must provide for notice, and secure it to a taxpayer, not as a matter of form, but as a matter of right."

To be sure, this decision was rendered in passing upon a tax regulation; but, as was said in that case, while tax officers are not judicial officers strictly, they exercise functions of a judicial nature.

So the Railroad Commissioner, in apportioning a burden upon railroad companies, exercises functions of a judicial nature. No one will contend that the imposition of the expense of maintaining the devices described in the order in this case, for all time, does not have the effect of appropriating for the public the property of petitioner. This order is in effect a judgment depriving petitioner of a certain amount of its earnings every year.

In Paulson vs. City of Portland, 149 U. S., 29, an assessment for cost of constructing a sewer was attacked on the ground that the city charter did not provide for notice. The court held that notice was provided for, and held:

1. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will.

2. Where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost for the construction of a sewer, the taxpayer has a right to be heard.

3. If provision is made for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.

And *Mutatis mutandis.*

This is one of the many cases where it has been held that a citizen is entitled to be heard upon the question of what proportion of the expense of a public work established under the police power his property shall bear.

If respondent can make the present order without being required to give a hearing, he can investigate other similar crossings and order the construction of safety appliances and apportion the expense in whatever ratio he may see fit. There is no reason why he may not compel petitioner to pay 90 per cent of the cost, if he can compel it to bear 50 per cent.

We insist that this statute, which attempts to confer upon the respondent the power to impose large and exhausting burdens upon street railroad companies, without any provision for a hearing, is a void provision for depriving persons or corporations of property without due process of law.

The distinction between Paulson vs. Portland and the case at bar appears when it is noted that, as stated by this court,

> "The city is a miniature State, the council is its legislature, the charter is its constitution; and it is enough if in that the power is granted in general terms, for, when granted, it must necessarily be exercised, subject to all limitations imposed by the constitutional provisions and the power to prescribe the mode of its exercise is, except as restricted, subject to the legislative discretion of the council."

Usually the grant of power to municipalities in this country to provide for the opening of streets, construction of sewers and drains and to tax the cost thereof upon property benefited, is general in its character, leaving to the legislative action of the Common Council the determination of the methods by which the power so conferred in general terms shall be exercised, but the Common Council

must, in the exercise of its power, make some provision or regulation by which notice shall be given to the property owner affected, and in the absence of such regulation or provision the proceeding would be invalid. The case at bar, however, is not one in which the grant of authority is of the same character. Here we have a case where there is a naked grant of power to an officer having no legislative authority under which he is empowered to investigate in any manner he may see fit the subject matter covered by the legislation, and which is couched in such language as precludes the idea of an inquiry and hearing on notice. The language of the statute is:

> "The Commissioner of Railroads shall examine the crossings of the tracks of railroads and street railways then existing, and order such changes made in the manner of such crossings, for such safeguards for protection against accident, as in his judgment ought to be so made or provided, and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable."

There is no provision in this or in any other statute authorizing the Commissioner to prescribe rules and regulations and to settle on a course of procedure to be followed under this section.

V.

The Legislature has not the power under the constitution to authorize the Railroad Commissioner to impose the cost of maintaining and operating safety devices and appliances upon the street railway company under the facts and circumstances in this case, for the reason:

1st, that it, in terms, imposes an additional burden and attaches an additional substantial condition to the right of the street railway to occupy the street and to operate its cars thereon;

2d, it violates the settled principle of constitutional law (in Michigan) under which the steam railway company, being the junior company making the crossing of the highway, of which the street railway is but a part, and which in fact, by such crossing, causes the danger which creates the necessity for the installation and maintenance and operation of safety devices, chargeable with the cost of such maintenance. The

Act, in terms, seeks to confer upon the Railroad Commissioner the general authority to place the burden of maintaining and operating safety devices upon one or both of the companies in such proportion as may to him seem just, yet such authority is qualified by and must be exercised in conformity with the settled principles of constitutional law, and which fix and determine the respective rights of the parties.

3d, the attempt to fix upon the street railway company, which is simply a user of the highway in common with the general public, the cost of installing, maintaining and operating devices intended for the protection of the whole public using the highway, is an unjust discrimination, and is a denial of the equal protection of the law to the street railway company.

In the outset, it must be noted that the companies, the steam railroad company, which is the junior company and whose crossing created the danger, and the street railway company, stand in wholly different relations so far as their rights are concerned, to the public. The steam railroad track and right of way is private property, along which the general public, either on foot, on horseback or in vehicles of their own, have no right to travel; whereas, the street railway track rests upon the public highway, and, while its rails may be private property, they are private property subject to certain public uses, and no matter what part of the highway they may be supposed to occupy, such occupation is not and cannot be exclusive. The street railway track remains a part of the public highway along which the public have a right to travel, and the street railway occupation is subject to the paramount right of the general public to use all parts of the highway. If there were no street railway track in the street at all, there would still be the general public using it, and the danger to the general public and the duty to provide against injury to the general public remain precisely the same. It is a matter of common knowledge, of which the Court will take judicial notice, that on the streets of cities immense truck loads of heavy material are constantly being hauled, and in these modern days heavy motor wagons and trucks and carriages for the transportation of persons and property are being constantly operated. So I say that in this respect the distinction between the two companies is so marked that it affects the entire question involved.

The gist and force of the distinction which we are seeking to make is this, that the steam railroad track and

right of way being wholly private property and being wholly devoted to the operation of steam cars on tracks and not devoted to the general public use, and the railroad company being the sole occupant and user thereof, there cannot arise on the reasons stated, any objection to the railroad company being subjected to the expense of maintaining the safety devices, upon the ground that it is denied the equal protection of the laws, whereas, as to the street railway company, it is one of the innumerable users of the common public highway, all of whom it is intended shall be protected from the dangers of the railroad crossing by the installation and maintenance of safety devices, and it is sought to select it out from among the numerous users of the highway upon whom to place the whole burden of maintaining the safety devices designed for the protection of all the innumerable users, against a danger not created by it, thus denying it the equal protection of the laws.

It is also a matter of common knowledge of which the Court will take notice that the gates and safety appliances that are constructed at the intersection of highway and steam railroads are placed not upon the railroad right of way for the purpose of checking and controlling the operation of trains upon the railroad, but are placed upon the highway to prevent the passage of vehicles and others traveling on the highway across the railroad track when trains are approaching or about to pass. No attempt is made to interfere with or interrupt the passage of trains. No attempt is made to require them to stop. This may be accounted for in two ways: 1st, that it would be an unreasonable regulation to require the stopping of heavy railroad trains on street crossings even where street car tracks are laid and operated on the street, and 2d, the real danger existing at these crossings, is the danger to the public traveling upon the highway, no matter what the form of conveyance or method of travel may be. Any danger arising to the railroad train because of pedestrians or ordinary vehicles or even the ordinary street car getting upon the track is a negligable quantity. A thousand persons might pass along the highway as free from danger as one person might were there no railroad track and no railroad trains rushed across the highway at a high rate of speed. In short, the practical application of any provision for the installation of safety devices at crossings of railroad tracks and highways operates as between users of the highway and users of the railroad to the distinct advantage and benefit of the railroad com-

pany, so far as any interference with any operation of the railroad is concerned. The safety devices are intended to prevent the public from getting upon the railroad track. The trains are not stopped to permit the public to pass freely, and we may concede that it is entirely reasonable and proper that such should be the proper application and result of such regulations and the installation of safety devices. But, on the other hand, it enforces the proposition that the real danger sought to be avoided is one which arises from the construction and operation of a railroad across the highway. Bearing these considerations in mind, we come to the discussion of the questions of well settled rules of law which, in our opinion, apply to this controversy.)

VI.

The discussion of what we have to say on this branch of the case will be in support of the application to it of well settled principles of law recognized by the Supreme Court of Michigan, and generally accepted by the courts throughout the country. They are as follows:

(1) "That the permission of the street railway company to lay its tracks in the street already appropriated to public use is not a grant of the right to appropriate an additional easement in the soil of the street, but the construction of such road is clearly a mode of facilitating existing travel and of modifying or changing the existing public use." It is simply adding an additional mode of conveyance to those already in the street. The interest of a street railway company in the street upon which its tracks are laid is a part of the public easement in the streets accessory and appertinent to the existing right of the public in passing over the street. It obtains no right to any part of the street to the exclusion of the general public.

(2) "The railroad company which has acquired a permanent easement in the street crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway laid along the street under permission from the city, as such easement is in subordination to the right of the public to pass along the streets, and the propelling of street cars is only a form of the exercise by the public of such right of passage and does not operate as

an infringement upon such easement." The street car carries along the street such passengers as would otherwise be obliged to pass over it on foot or by other conveyance. A steam railroad as ordinarily operated adds another servitude to the street because it prevents the use of the streets in the usual modes and interferes and embarrasses the usual modes of travel; whereas, the ordinary street railway furthers the original use of the street by relieving the pressure of local travel. The rights of the steam road to the crossing are and always have been subject to the public easement in the streets, subject to the right of public passage over the same. The propelling of street cars is only a form of the exercise by the public of its right of passage.

(3) Another well settled principle in Michigan is that a steam railroad in constructing its tracks across an existing highway must pay all the expenses of putting the highway in a safe condition and erecting and maintaining such safeguards as are required for the protection of travelers upon the street or highway as well as those who are traveling upon the steam cars. The correlative proposition is also well established, namely: When a public highway is laid out across an existing railroad, the public must compensate the railroad company, not only for the value of the land taken, but also for the construction of requisite safeguards, including gates, flagmen, fences, cattleguards, etc., for the protection of the public. The theory upon which this last doctrine is declared, as to the danger or as to the company or track which caused the danger or creates the conditions resulting in the danger to the public, it alone can be required under constitutional provision to be at the cost of reducing the danger to a minimum and of protecting the public, so far as it can be done, from damage.

We desire to emphasize the distinction elsewhere pointed out between the determination of the necessity for the safety devices at the crossing, and the determination of the person or corporation who should bear the expense incident to their construction and maintenance. The *necessity* for these precautions, the decision that the public safety requires them, is a matter which the Lgeislature has properly left to the Railroad Commissioner. His discretion is the sole test and measure; and ordinarily, in the absence of its abuse, its exercise is not a matter of inquiry. Neither is any person entitled to a hearing upon such a question.

But otherwise, when the Commissioner undertakes to distribute the burden of expense. As soon as he enters upon this branch of his delegated authority, his duties become judicial or quasi-judicial in character. His acts are no longer *discretionary*. Even the statute requires the apportionment of the burden to be just and equitable, and even in the absence of such requirement, he is as much bound by the rules of law as would be a court of justice were the question presented in a condemnation proceeding. If a court of law could not compel the older road to pay for making a crossing safe in a condemnation proceeding, will it be contended that a commissioner appointed by the Legislature could?

The necessity for these devices is a matter which the Legislature may decide upon; but who shall pay for them is a matter which can be decided only in accordance with established principles of law, among which is that whenever a person's property rather than another's is taken or burdened, for the public welfare, it must be either because he is benefited by the improvement, or because he renders the improvement necessary. In the absence of both of these conditions, property cannot be taken without compensation. These principles are universal in their application and control the Railroad Commissioner as well as any other officer, body ~~of~~ or person.

VII.

"According to a fundamental principle of law, the railroad seeking an intersection must make compensation for all damages and loss that may result therefrom."

Am. & Eng. Enc. of Law, Vol. 8, page 351.

This is the rule recognized generally, and enforced in Michigan, and is based upon the fact that until the intersecting road is built there is no danger. In accordance with this rule, it is generally held that where one railroad intersects another the former must make compensation; and likewise where a railroad is built over a highway, or where a highway is built over a railroad. This doctrine, thus generally recognized as applied to the facts of the case at bar, must mean that the Union Terminal Association should bear the expense of rendering Clark Avenue safe at the point where its tracks form the crossing. This would unquestionably be so in case the steam road were to condemn a right of way across a public street—under the repeated decisions of

the Michigan Supreme Court. These decisions recognize clearly the principle that the road making the crossing is responsible for the danger, and therefore must bear the expense of averting it. The same rule applies where a highway is opened across a railroad.

The following is quoted from an opinion by Mr. Justice Brewer (166 U. S.):

"The question was presented to the Supreme Court of Kansas in Kansas C. R. Co. vs. Jackson County Comrs., 45 Kan., 716, 724, where a highway was sought to be established across a railroad track, without any compensation, and the court denied the claim, saying: 'Whether the duty imposed upon the railroad company of constructing cattle guards, fecnes, signs, etc., can be or is imposed upon it under the police power of the State, makes no difference in this case. If the highway should not be established across the railroad company's right of way, then it would not be necessary for any of these things to exist; but if a highway is so established, then the duty under the statutes immediately springs into existence, requiring the railroad to so construct these things. The establishment of the highway is therefore the cause of all these additional burdens being imposed upon the railroad company. And must the railroad company bear these burdens and suffer these losses without compensation? Why should it be treated differently from others who have interests in real estate? All others having interests in real estate are entitled to compensation for losses resulting from the location of a public highway interfering with their free and rightful use of such interests. Smith County Comrs. vs. Labore, 37 Kan., 480, 484, et seq.' See also the many cases cited in the opinion. Among them is Grand Rapids vs. Grand Rapids & I. R. Co., 58 Mich., 641, 648, in which it was said by Campbell, Ch. J.: 'The damage done to a railroad by having a highway run across it must necessarily include all the additional expenses entailed by such a crossing, which in a city may involve a considerable outlay in making the crossing safe, and providing guards against accidents.' Again, in Chicago & G. T. R. Co. vs. Hough, 61 Mich., 507, 508, the Court observed, speaking by the same chief justice: 'If a railroad interferes with an existing highway, it must bear all the expense of crossing and restoring the highway as far as practicable to safe condition, and the fencing and cattle guards are necessary for that purpose. But, as pointed out in People vs. Lake Shore & M. S. R. Co., 52 Mich., 277, when a new highway is created, then it belongs to those who create it, to bear the expense of making the crossing in the condition necessary to meet all the expense and danger which it occasions.'"

In the case of the Illinois Central Railroad Co. vs. the City of Bloomington, 76 Ill., 447, after a railroad was built, a certain street was opened and made across it, the city by ordinance requiring the railroad company to make a proper and safe crossing by grading the approaches of the street at the crossing. The Court used the following language:

"Suppose a natural person had the right of way across his neighbor's grounds, and afterwards the city were to locate and open a street across his highway, does any one suppose the owner of the right of way could be compelled by legislative enactment, or an ordinance in pursuance thereof, to construct the crossing of the street at his own expense, *even if his use of the right of way should render the use of the street impracticable or dangerous until the approaches should be constructed?* We presume no one would contend for the power in that case. And why? Because it would impose an unequal and unjust public burden on the owner of the right of way, that in spirit would be the taking of private property for public use without just compensation, which is prohibited under the Constitution."

VIII.

So far we have endeavored to show that what may be called the doctrine of *priority of location*, is well recognized in Michigan and other jurisdictions. According to this doctrine the railroad is responsible for the danger at the crossing at Clark Avenue, because before it was constructed there was no crossing and consequently no danger there. It remains, then, for the steam railroad to bear the expense of making the crossing safe. It is a lame argument to say that because there may have been no necessity for these devices when its first track was built across the street it could not have been compelled in a condemnation suit to pay for devices which might become necessary in the future. The truth is, if no devices were needed while the Wabash company maintained a single track over the highway, and while the traffic was small, this should constitute no immunity from the obligation to protect the public from risk of injury by the 38 passenger trains which at present rush over this street without stopping—to say nothing of the freight traffic as well. If it is true that one track can be built over a highway and be excused from making compensation for safety devices on the ground that they are not necessary because of the smallness of the traffic on that one track,

and then turn about and increase the track and sell or lease to an association which permits four or five railroads to run their trains over such crossing, with the result that safety devices become necessary, and saddle the expense upon the public owning the highway, or worse still, upon one user of the highway, we think that the door is opened for gross inequality and fraud. We do not believe that such is a rule which this Court will enforce or recognize.

On the contrary, we not only contend that the new Terminal Association should bear this burden because its right to cross was obtained after petitioner's tracks were in the street, but we rest our argument on the broad ground of the *nature of the use* which these two corporations make of the highway at this point.

We contend that a street railway which has been granted a franchise to occupy a public street, acquires a right to use the same in common with other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and if it is built across a highway, it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be, if such railroad were not built across it at all. The authority for this view is found in the following cases, and although the facts to which the principles involved were applied differed from those of the case at bar, the principles themselves are involved here and must, in our opinion, control.

In Railroad vs. Street Railroad Co., 139 Ind., ..., 26 L. R. A., 337, it was held that a street railroad could be built in a highway, over the tracks of a railroad which had been built across the highway, without any compensation to such railroad. The Court said as follows: "The overwhelming weight of authority seems to settle the law * * * that a street railway is not an additional burden to that of the general easement in the street" (citing numerous cases); "the use of the street by appellant (the steam railroad) is subject to the easement of the public; and the burden of keeping the street crossing over its track in such a condition as not to impede or obstruct the public easement and use of the street by the public generally, is a burden already resting upon the appellant (that is, before the street railway was built). That burden is in no way added to or increased by the crossings appellee (street railway) proposes to construct. So long, therefore, as it is the settled law of this

State that a street railway is not an additional burden to that of the easement the general public has in the street, and that the street railway company's right to use the street is founded on that easement, that long it must be held the right of such street railway to cross over the tracks of a steam railway laid on such street *is subject to no conditions other than those to which the general public is subject* in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use that street, and the street crossings over its tracks; and it is generally incumbent on such steam railway companies to make such crossing as passable for the general public as they were before the construction of their tracks thereon, * * * having obtained its right of way subject to the burden of the easement in the public generally, *and the street railway being entitled to the use of that easement,* all the rights appellant obtained in the street for its steam railway were subject to the right of the street railway to use the street."

In C., B. & Q. Ry. Co. vs. West Chicago Street Railway Co., 156 Ill., 225, 29 L. R. A., 485, a similar set of facts were presented. It was said there "that the permission to a street railway company to lay its tracks in a street already appropriated to public use, is not a grant of the right to appropriate an additional easement in the soil of the street, but the construction of such a road is merely a mode of facilitating existing travel, and of modifying or changing the existing public use, adding an additonal mode of conveyance to those already upon the street. The interest of a street railway company in the street upon which its tracks are laid * * * is part of the public easement in the streets accessory and appurtenant to the existing right of the public in passing over the street." "A railroad company which * * * has acquired a permanent easement in the streets crossed by its tracks is not entitled to compensation for the crossing of such tracks by a street railway laid along the street, under permission from the city, as such easement is in subordination to the right of the public to pass along the streets, and the *propelling of street cars is only a form of the exercise by the public of such right of passage,* and does not operate as an infringement upon such easement."

The Court further said: "A city has no right to authorize railroad tracks to be laid upon streets so as to exclude the other public uses of a street. It will not be denied that pedestrians, and carriages and wagons and omnibuses have a right to pass along these streets over and across the tracks of the plaintiffs in error; a *street car* running upon rails,

laid upon the surface of the street, and used in the ordinary way, under the regulations of the city authorities, *is merely another sort of carriage*. The use of a street for horse railway is such a use as follows within the purposes for which streets are dedicated and acquired by dedication. 2 Dill Mun. Corp., 4th Ed., Sec. 722."

The Court further said "the street car carries along the street such passengers as would otherwise be obliged to pass over it on foot. * * * A steam railroad, as ordinarily operated, adds another servitude to the street, because it prevents the use of the street in the usual modes, and interferes and embarrasses the usual modes of travel; whereas the ordinary street railway furthers the original use of the street by relieving the pressure of local travel." (Citing cases.)

Speaking of the steam road, the Court said: "Its rights to the crossing are, and always have been, subject to the public easement in the streets, and subject to the right of public passage over the same. The propelling of street cars was only a form of the exercise by the public of its right of passage."

In a note in Vol. 29, L. R. A., 486, similar cases, discussing and applying these principles, are collated.

The foregoing cases, it will be observed, arose from an attempt by steam railroads to require street railroads wishing to intersect them to pay damages. "A similar question," says the writer of the editor in the note referred to (29 L. R. A., 486), "arises when a street railroad has been first built, and a railroad company seeks to acquire a crossing." All the cases recognize that a street railroad, from its franchise, acquires the right to use the street in common with others, and that a railroad company built afterwards must do all things necessary to render the highway safe and practicable for the lawful purposes for which it was opened, including, of course, street railroad purposes. If this is so, we insist that Wabash Railroad Company could not be authorized to build its steam road over Clark Avenue sixteen years after petitioner's tracks were in the street and petitioner by a statute passed after it was incorporated, be compelled to bear the expense of rendering the highway safe from a danger caused by, or due to the unusual use made of it by the Union Terminal Association. The street railway has a right to be in the street, and is entitled to use the public easement therein on an equal footing with anybody else. If it increases the danger of travel on the highway, it may be compelled to bear the expense of protecting the public from the danger caused by it. If, however, a railroad is afterwards constructed across the highway and danger

thereby arises to those who travel along the street, there could be no justification for compelling a street railway company to bear the expense of protecting the public easement from danger arising from such a source. It is no answer to say that the presence of the street railway tracks on Clark Avenue renders the crossing more dangerous. *A steam road acquires the right to cross in view of all possible, lawful uses which the street may be put to*, and if its presence there heightens the danger incident to the lawful use of the street, it alone can be regarded as the author of that danger, and should be compelled to bear the expense of averting it. As was said in New York, N. H. & H. Railroad vs. Bridgeport Traction Co., 65 Conn., page 410, where the street railway was put across an existing railroad, "the street railroad not so much *causes* as *increases* a danger." The danger which it increases is the danger caused by the steam road built across the highway, and but for the danger thus caused, the street railway would find no danger to increase. Besides this, such danger as is caused by the steam railroad, and increased by any lawful use of the highway, is a danger which the steam road is bound to foresee and provide against.

Where a railroad is built over a highway it runs the risk of being obliged to incur some expense in rendering the crossing thus made safe, and it may be required to pay for such devices as are necessary to bring about this result, reference being had to all possible lawful uses to which the highway may be put. It has been held accordingly that where a railroad is built across an existing highway, and afterwards a street railroad is laid in the street, no compensation need be made by the street railway, on the ground that the easement which the railroad acquired with the public highway was subject to a full enjoyment of the public easement, in and along the highway, in the enjoyment of which the street railway was entitled to participate.

In N. Y. & H. Railroad Co. vs. Bridgeport Traction Co., 65 Conn., page 410, this situation arose, and the Court held as we have indicated. The reason assigned was because "The steam road took the risk of suffering such an inconvenience or peril when it elected to build its road over Fairfield Avenue at grade. It (the street railway) was no more bound to porvide for compensation to the plaintiff railroad for the injury it may suffer than to provide for it in favor of any individual who may have occasion to cross the defendant's tracks at the hazzard of a possible collision with is cars."

The cases of this sort are collected in C., B. & Q. Ry. Co. vs. Steel, 47 Neb., 741, where the same doctrine was laid

down. In Railroad Co. vs. Buffalo R. & P. Railroad Co., 149 Pa. St., 1, the court approved of an opinion by the Common Pleas Judge, from which we quote the following: "The crossing of its track by the passenger (street) railway company gives no greater right to damages in the view we take of the case than it would be if the claim was made against an omnibus line."

It will, of course, be said that if the street railway tracks were not in the street, the derailing devices would not be necessary, and it is equally true that if there was no steam road built there, none of the devices would be necessary. We submit it is not sound to say that if the street railroad were not in the street there would be no crossing, and therefore no danger. If the street railroad were not there, there would be more frequent passing by pedestrians and persons in private conveyances, and the danger might be even greater in point of fact. It is sound to say, however, if the steam road which has an unusual use of the street had not been afterwards built across it, there would be no danger. The danger which is to be averted, then, is a danger directly caused by the steam railroad which is given the right to use the public easement, thus imposing an additional servitude upon the street and rendering the proper and usual modes of use of the highway hazardous. It might be said that if there was no omnibus line using the highway, there would not be so much danger of accident by a steam railroad which crossed it. The answer to this is that the use of the highway by an omnibus line as also by street railway is one of the lawful, ordinary uses of the highway, and if the presence of the railroad causes a danger to arise from the ordinary, lawful use of the public easement, then the steam road, and it alone, can properly be said to be responsible for that danger. If the danger thus caused by the steam road is heightened because the public easement is used in one manner rather than in another, so long as both methods are usual and lawful uses of the highway, that imposes a burden upon the corporation which causes the danger, and not the one which heightens it.

The decisions of the court of Michigan are in harmony with those already cited.

"It was held in Detroit City Ry. vs. Mills, 85 Mich., 634, that an ordinary street railway is not an additional burden or servitude, * * * and there is almost a consensus of judicial opinion in this direction."

Nichols vs. Railway Co., 87 Mich., p. 369.

Mr. Justice Cooley, in Grand Rapids vs. Heisel, 38 Mich., 62, said: "A street railway for local purposes, so far from constituting a new burden, is supposed to be permitted because it constitutes a relief to the street; it is in furtherance of the purpose for which the street is established, and relieves the pressure of local business and local travel instead of constituting an embarrassment. It is enough that the use of the street for a city railway is a proper use, and therefore a lawful use."

Speaking further, he said:

"But we cannot say the same in the case of the ordinary railroad." The rule is well settled in this State that the dedication of a street to the public does not authorize it to be so used for an ordinary railroad track."

In Detroit City Ry. vs. Mills, 85 Mich., p. 654, Justice Grant said, speaking of the use made of the street by a street railway:

"They constitute a modern and improved use only of the street as a public way. These improved methods become necessary in populous cities."

In conclusion we desire to say that we do not think a better statement of our view of the law of this branch of the case can be found than that contained in the opinion of Justice Grant on pages 34, 35, 36, 37 of the record. On page 34 he says: "Since writing the above I have received the opinion of my brother Moore. The question involved is of such great importance that I feel justified in making a brief reply." He then proceeds to state:

"It is well to keep in mind the precise question for our determination. The question is not between two steam railroads crossing each other on private grounds or on the public highway. Neither is it between steam railroads and the entire public using the highway. It is between steam railroads and one user of the public highway,—and the question is who shall pay for the protection of the entire public? or, in other words, can one user of the public highway be required to pay part or all the expense of protecting all users of the highway, and as well those traveling upon the steam road? It must also be borne in mind that no one is seeking to abridge, lessen or destroy the police power of the State to adopt any and all regulations which are necessary to protect the persons and property of those using the highway or the steam road. This power remains the same. The State, either directly or through the municipality, can regulate the speed of street cars within 100, 500 or a 1,000 feet of the crossing. It can compel them to stop at any distance

from the crossing. It can regulate the speed of the steam car when approaching. It can, as it now does, compel an employee on the street car to advance to the track before crossing and see whether the crossing is safe. It may compel the steam road to erect gates, etc.

I again quote from Chicago, etc., R. Co. vs. Whiting, etc.:

"So long, therefore, as it is the settled law of this State that a street railway is not an additional burden to that of the easement the general public has in the street, and that the street railway's company's right to use the street is founded on that easement, that long it must be held that the right of such street railway to cross over the tracks of the steam railway laid on such street is subject to no conditions other than those to which the general public is subject in traveling over such streets. When the steam railway company obtains its right of way over and along a public street, it does so subject to the right of the general public to use that street, and the street crossings over its tracks; and it is generally incumbent on such steam railway companies to make such crossings as passable for the general public as they were before the construction of their tracks thereon."

The logic of this case and others cited by me upon the same point is, that the street railway is a proper, legitimate and necessary use of the public highway, and that it cannot be made subject to conditions "other than those to which the general public is subject in traveling over the streets." Wherein is the logic of compelling one user of the public highway to pay the whole or part of the expense in protecting all users of the highway against the dangers incident to the passage of long, swift and ponderous trains of steam cars? It is not the street car which causes the congestion of travel at this point; on the other hand, it relieves the congestion. The congestion is caused by the increase of population,—by vehicles of all sorts, engaged in the transportation of goods and passengers, and as well travelers on foot.

My brother refers to the horseless carriage as probably increasing the danger to those who have the right to travel in the streets. Will it be contended that the owners of horseless carriages could be selected from the owners of other vehicles using the highway and compelled to in part or entirely pay for the expense of gates, etc., at a railroad crossing?

If a cartage company, a corporation, were engaged in the transportation of goods with its heavy trucks and

enormous loads over this highway every fifteen minutes or half hour in the day, could it be compelled to pay part or all of the expense to avoid the danger caused by the trains of the steam roads? Many vehicles with their loads are as heavy, and sometimes nearly or quite as large, as ordinary street cars. The tally-hoes, with four or six horses, are certainly as dangerous at these crossings as are the street cars. But for the street cars there would be more conveyances of other character, and more congestion of travel at these crossings; and consequently more danger than results from the use of the street cars.

It is urged that the facts in the cases I have cited are not those of this case, and that the precise question now before us was not involved in them. This is true. The same may be said of the cases cited in my brother's opinion, unless it be the Maine case, to which I will refer hereafter. The question is a new one, and calls for the application of principles to be deduced, so far as possible, from the decided cases, and by the application of sound legal principles.

My brother says:

"If there was no highway at this point traveled by a line of electric railway cars, and by the public, there would be no occasion for the interference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and under the exercise of the police power in the interest of public safety, the State is authorized to interfere through its agent the railroad commissioner." Citing several cases.

Will it be said that if there were no electric cars there would be no necessity of interference by the commissioner or some other authorized body to protect the public and prevent danger? Is the electric car the sole cause of the danger so far as it is caused by the using of the highway? Might not the danger be as great, or even greater, without the street car? The cases cited by my brother relate to fences, cattle-guards, farm crossings, and the like, and do not touch this case. The statement of my brother that "under the exercise of the police power in the interest of public safety, the State is auhorized to interfere," is the conceded law. But does that affect the question who shall pay for these safeguards?

The authorities cited, apportioning the expense where one steam road crosses another, are not, in my judgment, applicable. He quotes extensively from Railroad Company vs. Railroad Company, 30 Ohio St., 604. I under-

POINTS FOR PLAINTIFF IN ERROR ON MOTION TO DISMISS OR AFFIRM.

I.

Since the preparation of the brief of the plaintiff in error in this case, we have been served with a motion in behalf of the defendant in error, for a dismissal of the writ of error or affirmance of judgment. Two points are sought to be made by the motion, 1st, that there was no Federal question raised in the case or passed upon in the court below, and 2d, if Federal questions were raised and necessarily passed upon in the court below they have been so frequently passed upon by this court, adversely to the position taken by the plaintiff in error, that they have become settled law and no longer open to argument. The motion in terms follows the language of the rule that the writ of error is evidently issued for the purpose of delay and the questions raised are frivolous and without merit.

II.

A reference to the petition will disclose that the first ground of the motion above stated, i. e., no Federal questions were raised in the case, is utterly without foundation. The petition is contained on pages 11, 12, 13, 14, 15, 16 and 17 of the record. After stating the facts in the case, among others, stating the provisions of law under which the commissioner claimed authority to make the order in question, paragraph 12 of the petition (pp. 16 and 17) states as follows:

> "Your petitioner represents that it is advised that the said order of the Railroad Commissioner is wholly without authority of law and is void and without force; and charges that unless it is so declared by this court, your petitioner will be subject to a penalty of ten dollars ($10) a day until said order is complied with. That the enforcement of this order is unjust and oppressive and that unless its enforcement is prevented by this court, your

petitioner will be deprived of its property, franchises and rights without due process of law, and in contravention of section 10, article 1, of the Constitution of the United States, and of a like provision of the Constitution of the State of Michigan, and will also be denied the equal protection of the laws in contravention of section 1 of the fourteenth amendment of the Constitution of the United States."

The section further goes on to state that your petitioner is without remedy, except save in the manner sought, that is to say, through a writ of mandamus, requiring the Railroad Commissioner to vacate the order in question. The truth, as shown by this record, is that the only points raised were those coming within the questions raised in paragraph 12, to-wit, lack of due process of law, and the taking of the property of the plaintiff in error and without compensation and the denial to it of the equal protection of the laws by the making and enforcement of the order. In this branch of the motion, it remains to be seen whether these points were argued to the Supreme Court of the state and the rights claimed under the constitutional provisions named, necessarily denied to the plaintiff in error by that court.

It would seem as though counsel for the defendant in error had either not read the opinions of the judges of the State Supreme Court or had read them so carelessly that he did not understand the point on which that court divided. The two opinions will be found in the record; that of three of the judges, a bare majority, on pages 19 to 29, that of the minority, on pages 30 to 37. That the question that the State Supreme Court discussed in the opinions, seemed to them to be one of considerable difficulty and great importance and seriousness, is sufficiently shown by the fullness and elaborateness of the opinions and the evident earnestness with which they were written.

The question upon which they divided was the one under the fourteenth amendment raised by the plaintiff in error, to-wit, that in the making of the order, it was denied the equal protection of the laws, the exact point being that the street railroad company was simply one of the innumerable users of the public highway, all of whom stood, so far as the use of the highway was concerned and so far as their right to use the highway was concerned, in a public sense, upon an equal footing, and

that to select one of the users of the highway and to place upon that user, the burden of maintaining gates in the highway at the railroad crossing, and the expense of maintaining and operating the gates for the protection of the whole public, was an unlawful discrimination and a denial to it of the equal protection of the laws.

It is the well settled law of Michigan and we believe it is the well settled law of every state of the union that a street railway is not an additional burden upon the easement, but is in direct accordance with the purposes for which the highway was established and that the company has not exclusive rights in any part of the highway, but its use thereof is subject to the paramount right of the general public to travel thereon.

III.

The cases cited in the opinion of Justice Grant and which the majority of the court declared were distinguishable from the one under consideration, were quite numerous, and are fully referred to and quoted from by the learned justice and in the brief for plaintiff in error on the merits.

In looking at the opinion of Judge Grant on page 34, it will be seen that his opinion was evidently intended to be, when written the opinion of the court. After fully discussing the question of discrimination and holding that the street railway company was a lawful user of the highway and as such user could not be selected to pay the whole or any part of the expenses for the protection of all who travel upon the highway or upon the railroad, states,

> "This disposal of the case renders it unnecessary to determine the other questions raised."

He then continues:

> "Since writing the above, I have received the opinion of my brother, Moore. The question involved is of such great importance that I feel justified in making a brief reply."

The opinion then proceeds to discuss and consider the views of the opinion of Judge Moore which was finally adopted as the opinion of the majority.

This court has frequently stated that it was not necessary that the lower court should quote the constitutional

provision or in direct language state that the question passed on was a question under the Federal constitution. It is enough if the question is raised by the pleadings and the point necessarily passed on when reaching a conclusion adversely to the party asserting the constitutional right.

IV.

The other Federal question raised by the petition and the denial of the constitutional right which the plaintiff in error asserted, resulting from the order of the Railroad Commissioner, was that the order of the Railroad Commissioner was not due process of law. This point was very fully presented in the brief and oral argument. The exact point was that the authority of the Railroad Commissioner to make the order in question was conferred solely by section 5 of the statute quoted in the main brief. The answer of the Railroad Commissioner found on pages 9 to 11 of the Record and in paragraph 5, he quotes section 5 of the Act, and asserts that it conferred upon him the authority and duty to make the order which this proceeding is instituted to vacate and set aside. The section confers plenary power upon the Commissioner to make and requires him to exercise that power. It does not require or make any provision for any notice to the parties or any hearing of a legal character or of any character to the parties. It is utterly silent in that regard. It has reference solely to crossings in existence at the time of the passage of the whole act, in which it is included. All of the other provisions of the act have reference to the making of crossings after the passage of the act and confer upon the Railroad Commissioner certain powers and jurisdiction with reference to such future crossings and fixes the method and the practice by which the jurisdiction of the Railroad Commissioner is invoked. They have no reference whatever to the exercise of the jurisdiction of the Railroad Commissioner over crossings that were already established when the act was passed, and their provisions are apt and clear in not only defining the cases where the jurisdiction may be exercised and the method by which it will be invoked, but also in express terms declares upon whom the burden of maintaining the safety appliances shall be placed, i. e., upon the junior company.

The plaintiff in error therefore claimed that as the section of the act which the Railroad Commissioner admits was the one creating the jurisdiction which he attempted to exercise, omitted to provide for any notice to the parties in interest, or for a hearing before he should impose upon them the burden and expense of installing and maintaining the safety devices, it was void and his action thereunder was a determination of the rights of the parties without due process of law. This objection to the act, if held good, necessarily determined that the order of the Railroad Commissioner was absolutely void and the order could not be sustained, as it was, by a majority of the State Supreme Court without overruling this objection.

It does not seem to us necessary in the brief on the motion to cite the cases showing the serious character of this point. They are fully discussed in the brief on the merits, and are also contained in the quotations from the briefs filed for the plaintiff in error in the Supreme Court of the state. Why the court below did not consider the point in the opinions filed, does not appear but it is quite evident that it was overlooked. We print herewith those portions of the briefs of plaintiff in error in the Supreme Court of the state touching this question. The main brief filed by petitioner contains the following discussion:

> "The act in question is unconstitutional and void in our opinion, for the reason that it makes no provision for notice, and gives no opportunity for a hearing to the corporations interested. It, in fact, lacks all the necessary characteristics of a valid statute under which property may be taken from one person and given to another, or by whose authority the property of either may be appropriated to public service or use.
>
> "It is without doubt essential to the validity of every law under which proceedings may be had for the taking of property or to impose a burden upon it which may result in taking it, that the law make provision for giving some kind of notice."
>
> Garvin vs. Daussman, 114 Ind., 429.

In Kuntz vs. Sumption, 2 L. R. A., 655, it was held that a statute authorizing a board of equalization to increase the valuation of the property of an individual taxpayer listed by him for taxation, was

unconstitutional because there was no provision for notice. The action of the Commissioner is not rendered valid because he supplemented the statute by a notice and hearing which he was not required nor authorized by the statute to give. As was said in the case last cited: "Without a law authorizing notice there can be none."

"The ultimate conclusion which we reach is that where a conclusive decision is authorized the statute itself must provide for notice, and secure it to a taxpayer not as a matter of form, but as a matter of right."

To be sure, this decision was rendered in passing upon a tax regulation; but as was said in that case, while tax officers are not judicial officers strictly, they exercise functions of a judicial nature.

So the Railroad Commissioner in apportioning a burden upon railroad companies exercises functions of a judicial nature. No one will contend that the imposition of the expense of maintaining the devices described in the order in this case, for all time, does not have the effect of appropriating for the public the property of petitioner. This order is in effect a judgment depriving petitioner of a certain amount of its earnings every year.

In Paulsen vs. City of Portland, 149 U. S., 29, an assessment for cost of constructing a sewer was attacked on the ground that the city charter did not provide for notice. The Court held that notice was provided for, and held:

1. A sewer is constructed in the exercise of the police power for the health and cleanliness of the city, and the police power is exercised solely at the legislative will.

2. Where an attempt is made to cast upon his particular property a certain proportion of the burden of the cost for the construction of a sewer, the taxpayer has a right to be heard.

3. If provision is made for notice to and hearing of each proprietor, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law.

And *mutatis mutandis.*

This is one of the many cases where it has been held that a citizen is entitled to be heard upon the question of what proportion of the expense of a public work established under the police power, his property shall bear.

If respondent can make the present order without being required to give a hearing, he can investigate other similar crossings and order the construction of safety appliances and apportion the expense in whatever ratio he may see fit. There is no reason why he may not compel petitioner to pay 90 per cent of the cost, if he can compel it to bear 50 per cent.

We desire to emphasize the distinction elsewhere pointed out between the determination of the necessity for the safety-devices at the crossing, and the determination of the person or corporation who should bear the expense incident to their construction and maintenance. The *necessity* for these precautions, the decision that the public safety requires them, is a matter which the legislature has properly left to the Railroad Commissioner. His discretion is the sole test and measure; and ordinarily in the absence of its abuse, its exercise is not a matter of inquiry. Neither is any person entitled to a hearing upon such a question.

But otherwise, when the Commissioner undertakes to distribute the burden of expense. As soon as he enters upon this branch of his delegated authority his duties become judicial or quasi-judicial in character. His acts are no longer *discretionary.* Even the statute requires the apportionment of the burden to be just and equitable, and even in the absence of such requirement, he is as much bound by the rules of law as would be a court of justice were the question presented in a condemnation proceedings. If a court of law could not compel the older road to pay for making a crossing safe in a condemnation proceeding, will it be contended that a commissioner appointed by the legislature court?

The necessity for these devices is a matter which the legislature may decide upon; but who shall pay for them is a matter which can be decided only in accordance with established principles of

law, among which is that whenever a person's property rather than another's is taken or burdened for the public welfare, it must be either because he is benefited by the improvement, or because he renders the improvement necessary. In the absence of both of these conditions, property cannot be taken without compensation. These principles are universal in their application and control the Railroad Commissioner as well as any other officer, body or person.

We insist that this statute which attempts to confer upon the respondent the power to impose large and exhausting burdens upon street railroad companies, without any provision for a hearing, is a void provision for depriving persons or corporations of property without due process of law.

We contend that Act 171, Public Acts of 1893 and the order of respondent are void for the reason that they deprive relator of its property without due process of law and without just compensation, and deny relator the equal protection of the law, in violation of article V., and Section 1 of Article XIV. of the amendments to the Constitution of the United States; and of Section 32 of Article VI. and Section 14 of Article XVIII. of the Constitution of the State of Michigan.

In the reply brief the matter was treated at considerable length. After analyzing the statute at length, it proceeds to say:

"The statute treats the crossings in two classes:
A. Future crossings.
B. Existing crossings.

As to class A, the jurisdiction of the officer is invoked by the application of the junior company for the approval of crossing plan by the Railroad Commissioner, on due notice to senior company. Upon such application the jurisdiction of the Commissioner is limited to the approval of the plans and necessary safeguards. The cost of the safeguards are by the statute made a charge against the junior company.

As to class B (Existing crossings), the jurisdiction attempted to be given the officer is broader and more plenary. Its exercise is required by the

terms of the statute. It is visitorial and inquisitorial, and is the police power put in aggressive action by the state for the purpose of affecting existing lawful conditions. As to this class the quasi-judicial power is given the office to divide the cost of installing and maintaining such safety devices as he may order between the companies in such proportion as he may deem just and reasonable, and the language of the act excludes the idea of requiring notice.

It will also be noted that if under class 'A' the steam railroad company is the junior company, it must install at its own expense all safeguards, thus applying the rule of just compensation for which we contend: whereas, under class 'B,' even though the steam road be the junior one, and the sole cause of the danger, it may be wholly relieved (in substance) from any expense.

The cases are quite numerous in support of the proposition, that it is not enough that notice of some kind be actually given. The constitutional guaranty of 'due process of law' requires that that statute must, in direct terms, provide for and require notice.

Siefert vs. Brooks, 34 Wis., 443;
State vs. Fond du Lac, 42 Wis., 287;
Whitefore vs. Probate Judge, 53 Mich., 130;
Stuart vs. Palmer, 74 N. Y., 183;
Kuntz vs. Sumption, 2 L. R. A. (Ind.), 655;
Baltimore vs. Seneca Co. Treas., 1 West. R., 94;
Lewis Eminent Domain, 368;
Garvin vs. Daussman, 114 Ind., 429.

No case can be found which holds that such a proceeding is valid without notice, and all cases hold that notice must be required by the express terms of the act or by necessary implication and this necessary implication must not arise because of the constitutional requirement of 'due process of law,' but one arising from an interpretation of the language of the statute."

In conclusion, we beg to say that we believe that the finding of the Railroad Commissioner is in violation of the rule heretofore laid down by this court, as to the

obligation of the junior road to install and maintain safety devices; that the section of the statute under which the action is taken, and the action itself, deprive the relator of its property without due process of law, and denies it the equal protection of the law, and is in violation of the Fourteenth Amendment to the Constitution of the United States, and that the same is the taking of defendant's property without just compensation.

JOHN C. DONNELLY, and
MICHAEL BRENNAN,
Counsel for Plaintiff in Error.

No. 139.

FILED
OCT 25 1902
JAMES H. McKENNEY,
Clerk.

In the Supreme Court

Brf. of Oren & Maynard for D

United States.

Filed Oct. 25, 1902.

OCTOBER TERM, 1902.

No. 139.

THE DETROIT, FORT WAYNE and BELLE ISLE RAILWAY,

Plaintiff in Error,

vs.

CHASE S. OSBORN, Commissioner of Railroads,

Defendant in Error.

Motion to Dismiss for Want of Jurisdiction, or to Affirm the Judgment, and Brief in Support Thereof.

HORACE M. OREN,
Attorney General of Michigan,

FRED A. MAYNARD,

Attorneys for Defendant in Error.

In the Supreme Court

OF THE

United States.

OCTOBER TERM, 1902.

No. 139.

THE DETROIT, FORT WAYNE and BELLE ISLE RAILWAY,

Plaintiff in Error,

vs.

CHASE S. OSBORN, Commissioner of Railroads,

Defendant in Error.

Motion to Dismiss for Want of Jurisdiction, or to Affirm the Judgment, and Brief in Support Thereof.

Comes now the defendant in error, in this cause, and moves this Honorable Court to dismiss the Writ of Error herein, because, he says, this Court has no jurisdiction thereof; or to affirm the judgment, it being manifest that, even if the court has jurisdiction, the writ was taken for delay only, and

the question on which the jurisdiction depends is so frivolous as not to need further argument.

In support of this motion we assign the following reasons:

1. There is no Federal question arising on the record filed in this court.

2. No Federal question arose in the Supreme Court of Michigan, the court of last resort in that State, which was decided against the title, right, privilege or immunity set up or claimed by the plaintiff in error.

3. This case simply involves the construction of a statute of said state, and no Federal question is raised thereby because, in its decision, said state court did not give such a construction to said statute as to make it conflict with the constitution or laws of the United States, and sustaining its validity after giving it such construction.

4. The Supreme Court of the State did not refer to the Federal constitution, or consider and decide any Federal question. For aught that appears, the court proceeded in its determination of the cause without any thought that it was disposing of such a question.

5. Assuming that a Federal question was presented for decision by the state court, it affirmatively appears that its decision was not necessary to the determination of the case, and it further affirmatively appears that said State Supreme Court did not decide said Federal question adverse to the plaintiff in error.

6. The judgment of said State Supreme Court was

properly rendered without deciding the Federal question presented, or attempted to be presented, by the plaintiff in error.

7. The questions, not Federal, which were presented to said State Supreme Court, by the plaintiff in error, and decided against it, were sufficient to sustain its judgment, and, therefore, this court will not review the same.

8. In other words, the ground upon which the judgment rested was broad enough to sustain it without deciding any Federal question, if there was any in the case.

9. No property of the company has been taken, and the duty which the order imposed was by due process of law.

10. The attempted injection of so-called "Federal questions" into the record was solely for delay, and are frivolous.

To BRENNAN, DONNELLY & VAN DE MARK,

Attorneys of Record for Plaintiff in Error in the above entitled cause:

You are hereby notified that the Defendant in Error, in the above entitled cause, will, on Monday, the first day of December, A. D. 1902, on the meeting of the Supreme Court of the United States, on that day, or as soon thereafter as counsel can be heard, submit for the consideration of the court the foregoing motion, and the brief thereon hereto attached.

HORACE M. OREN,
Attorney General of Michigan,
FRED A. MAYNARD,
Attorneys for Defendant in Error.

BRIEF IN SUPPORT OF MOTION.

We respectfully ask this Honorable Court to dismiss the Writ of Error, in the above entitled cause, for the want of jurisdiction, on the authority of Eustis V. Bolles, 150 U. S., p. 361.

In the foregoing motion we have assigned reasons why this Court has no jurisdiction to review the judgment rendered by the Supreme Court of Michigan in this case. They are taken from and based on the decisions of this Court. In the language of Mr. Justice McKenna, in delivering the opinion of the court, in Harrison vs. Morton, 171 U. S., pp. 38-47: "It is not necessary to review these decisions. That has been done by Mr. Justice Shiras in Eustis vs. Bolles, 150 U. S., 361, as follows:

"It is settled law that, to give the court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a Federal question was presented for decision by the state court, but that its decision was necessary to the determination of the cause, and that it was actually decided adversely to the party claiming a right under the Federal laws or Constitution, or that the judgment as rendered could not have been given without deciding it. Murdock vs. Memphis, 87 U. S. (20 Wall., 500); Cook County vs. Calumet & C. Canal & D. Co., 138 U. S., 635.

"It is likewise settled law that, where the record discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the Constitution or laws of the United States, another question, not Federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding

the Federal question, to sustain the judgment, this court will not review the judgment."

Other decisions of this court, on which the reasons assigned in the motion are based, are entitled as follows:

Simmerman vs. Nebraska, 116 U. S., 54.
California Powder Works vs. Davis, 151 U. S., 389.
Missouri P. R. R. Co. vs. Fitzgerald, 160 U. S., 556.
Fowler vs. Lamson, 164 U. S., 252.
Iowa Central R. R. Co. vs. Iowa, 160 U. S., 389.
Long Island Water Supply Co. vs. Brooklyn, 166 U. S., 685.
Miller vs. Cornwall R. Co., 168 U. S., 131.
Chappell Chemical & F. Co. vs. Sulphur Mines Co., 172 U. S., 465.
New Orleans Water Works Co. vs. Louisiana Sugar Refining Co., 125 U. S., 18.
Clark vs. Pennsylvania, 128 U. S.. 395.
De Saussure vs. Gaillard, 127 U. S., 216.
Kansas Endowment & Benev. Assn. vs. Kansas, 120 U. S., 103.
Church vs. Kelsey, 121 U. S., 282.
Kennebec & P. R. Co. vs. Portland & R. R. Co., 81 U. S., 14 Wall., 25.
Rector vs. Ashley, 73 U. S., 6 Wall., 142.
Gibson vs. Chouteau, 75 U. S., 8 Wall., 314.
Klinger vs. Missouri, 80 U. S., 13 Wall., 257.
Detroit City R. Co. vs. Guthard, 114 U. S., 133.

There is no question whatever that the rules declared in

Eustis vs. Bolles, and in the other cases cited, are the "settled law" of this country.

It only remains to apply them to the facts of this case.

The record shows that in 1893 the Legislature of Michigan passed Act No. 171, which provides (Sec. 5) "that the Commissioner of Railroads shall * * * * examine the crossings of the tracks of railroads, and street railroads, then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents, to be provided thereat, as in his judgment ought to be made and provided; and shall apportion any expense incident thereto between the companies affected, as he may deem just and reasonable."

Under the authority of this Act, the defendant in error ordered the construction of certain safety devices and apportioned the expense of its construction and maintenance between the Terminal Association and the plaintiff in error.

The plaintiff in error sought, by mandamus proceedings, to have said order revoked by the Supreme Court of Michigan.

The point relied on by the plaintiff in error, in its brief, in the Supreme Court of Michigan, as appears on page 20 of the record, was this:

"There are a number of important questions involved in this controversy, one being the extent of the authority of the railroad commissioner over street railway companies. We feel it necessary, however, to suggest only one of these questions, because the adjudication thereof in the manner we anticipate will render a consideration of the others unnecessary.

"We call attention to the fact fully set out in the petition that the necessity for the order of the railroad commissioner, if any there be, is due to the construction of the Terminal Association's tracks after petitioner's tracks were laid. The danger is not caused by petitioner, nor due to its presence in the street. Under the well-settled rule of this court the cost of making the crossing safe must be borne by the company making the crossing and responsible for the danger."

In its reply brief, and on the argument, the question as to whether a street railway is, or is not, an additional servitude, was also considered.

The only reference to Federal questions in the entire record in the court below is found in a few lines, in the petition, record page 17, and nine lines, in the shape of a rider, on the thirtieth page of its reply brief, simply referring to the sections of the Federal Constitution.

We submit that under such circumstances it is not strange that the Supreme Court of the State of Michigan did not refer to the Federal constitution, or consider and decide any Federal question. As was said by Mr. Chief Justice Fuller, in another Michigan case, sought to be brought to this court, Michigan Sugar Co. vs. Dix, Auditor General, S. C. Rep., Vol. 22, p. 581: "For aught that appears the court proceeded in its determination of the cause without any thought that it was disposing of such questions."

The questions presented to the Supreme Court of Michigan were purely state questions, calling for a construction of a state statute.

This court has many times said "that it is the peculiar

province and privilege of the state courts to construe their own statutes; and it is no part of the functions of the Supreme Court to review their decisions, except when specially authorized so to do."

Commercial Bank vs. Buckingham, 5 How., 317.
Adams vs. Preston, 22 How., 473.
Congdon Mining Co. vs. Goodman, 2 Black, 574.
Smith vs. Adsit, 16 Wall., 185.
Klinger vs. Missouri, 13 Wall., 257.
Murray vs. Gibson, 15 How., 421.
Nichols vs. Levy, 5 Wall., 433.

And this is true, although the position of the state court is an unsound one.

De Saussure vs. Gaillard, 127 U. S., 216.

There can be no question whatever that no Federal questions are presented in the points relied on by the plaintiff in error above referred to. The first point is answered by showing that the legislation itself, and the order of the railroad commissioner based thereon, was simply in the exercise of the police power of the state, and approved by the elementary principles governing the same.

The second point, as to whether a street railway is, or is not, an additional servitude, while an important one, raises a purely state question, and, under the facts of this case, a purely immaterial one, for this reason: No street railway corporation can lay its tracks, in any public highway, and run its cars thereon, for business purposes, without first obtaining

the consent of the public authorities, and this consent is always given with the express condition that the company will obey all reasonable regulations for the protection of the public, which may then, or thereafter, be enacted by said public authorities.

This court supervises decisions of state courts only when a Federal question arises, and, of its own motion, will deny its jurisdiction unless it affirmatively appears, on the face of the record, although neither party makes the point in argument.

King Iron Bridge vs. Otoe Co., 120 U. S., 225.

There are, we insist, no Federal questions in this case, unless they can be injected into any case, in any court, by the simple assertion that the complaint, bill or declaration, or the statutes on which they are based, are contrary to certain provisions of the Federal constitution. If, by simple pleading, jurisdiction can be given this Court, then it will indeed "become the Mecca to which all dissatisfied suitors in the state courts may turn for the correction of all the errors said to have been committed by the state tribunals." But such, of course, is not the law.

"Something more than a bare assertion of such authority is essential to the jurisdiction of this Court."

Millingar vs. Hartupee, 6 Wall., 258.

"A real, and not a fictitious Federal question, is essential to the jurisdiction of this Court over the judgments of state courts."

Hamblin vs. Western Land Co., 147 U. S., 532.

"The bare averment of a Federal question is not, in all cases, sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay."

New Orleans vs. New Orleans Water Works Co., 142 U. S., 79.

"We do not think it necessary to narrowly inquire whether the record formally discloses that the respondents relied upon and pleaded rights under the Constitution of the United States, because we are of the opinion that even if it be conceded that the respondents did, in form, invoke the provisions of the Federal Constitution, yet that no Federal question was really raised. The bare averment in the answers of supposed infringements in the proceedings of rights possessed by respondents under the Constitution of the United States will not alone suffice."

St. Louis, Girardeau & Fort Smith Ry. Co. vs. State of Missouri, 156 U. S., 478.

"Upon the case made by the plaintiff in error, the Federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the Federal Constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws."

Wilson vs. State of North Carolina, 169 U. S., 586-595.

"It does not follow, however, that the case at bar is one

of federal cognizance because it contains a reference to numerous acts of congress, and lengthy extracts therefrom. A case which in fact depends for its decision upon questions of local or general law cannot be brought within the jurisdiction of a federal tribunal as one arising under the constitution and laws of the United States merely by a reference in the complaint or declaration to some federal statute or statutes, and by setting up a claim thereunder which is merely colorable, and obviously without any reasonable foundation. If such a practice was tolerated, the result would be that the jurisdiction of the federal courts would be unduly enlarged, and made to comprehend a class of cases which were never intended to be tried therein."

St. Paul, M. & M. Ry. vs. St. Paul & N. P. R. Co.
68 Fed. Rep., 11.

Even if this Court should determine the point of want of jurisdiction against us, we then ask that the same course be taken as was adopted in

New York & New England R. R. Co. vs. Town of Bristol, 151 U. S., 556,

wherein Mr. Chief Justice Fuller, in delivering the opinion of this Court, said:

"We agree with counsel that this court has jurisdiction, but are of opinion that the principles to be applied in its exercise are so well settled that further argument is not needed, and that, this being so, the jurisdiction may be said under the circumstances to rest on so narrow a foundation as to give color to the motion to dismiss and justify the disposal of the case on the motion to affirm."

The aid of the same sections of the Federal constitution

is invoked in the case at bar as in the case just referred to, viz., Sec. 10, Art. I, relative to the deprivation of property, etc., without compensation and without due process of law, and impairing the obligation of contracts, and the equal protection of the laws, guaranteed by Section I of the Fourteenth Amendment.

The same answer can be made in this case as in that, as follows:

"It is likewise thoroughly established, in this court, that the inhibitions of the constitution of the United States upon the impairment of the obligation of contracts, or the deprivation of property without due process, or the equal protection of the laws, by the states, are not violated by the legitimate exercise of legislative power in securing the public safety, health and morals. The governmental power of self-protection cannot be contracted away, nor can the exercise of rights granted, nor the use of property, be withdrawn from the implied liability to governmental regulations in particulars essential to the preservation of the community from injury. And also that 'a power reserved to the legislature to alter, amend or repeal a charter, authorizes it to make any alteration or amendment of a charter, granted subject to it, which will not defeat or substantially impair the object of the grant or any rights vested under it, and which the legislature may deem necessary to secure either that object or any public right.' * *

"As observed by Mr. Justice Miller, in Davidson vs. New Orleans, 96 U. S., 97, the fourteenth amendment cannot be availed of 'as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in the state court of the justice of the decision against

him, and of the merits of the legislation on which such a decision may be founded.' * * * *

"The conclusions of this court have been repeatedly announced to the effect that though railroad corporations are private corporations as distinguished from those created for municipal and governmental purposes, their uses are public, and they are invested with the right of eminent domain, only to be exercised for public purposes; that therefore they are subject to legislative control in all respects necessary to protect the public against danger, injustice, and oppression; that the state has power to exercise this control through boards of commissioners; that there is no unjust discrimination and no denial of the equal protection of the laws in regulations applicable to all railroad corporations alike; nor is there necessarily such denial or infringement of the obligation of contracts in the imposition upon them in particular instances of the entire expense of the performance of acts required in the public interest, in the exercise of legislative discretion; nor are they thereby deprived of property without due process of law, by statutes under which the result is ascertained in a mode suited to the nature of the case, and not merely arbitrary and capricious; and that the adjudication of the highest court of a state, that, in such particulars, a law enacted in the exercise of the police power of the state, is valid, will not be reversed by this court on the ground of an infraction of the Constitution of the United States."

The order made in the case at bar is not near so hard as in the one just above named. We have here the same constitutional and statutory power to amend, alter or repeal the charter of the company. The only difference is, that, in the case at bar, the plaintiff in error is a street railway corporation, instead of an ordinary steam railroad corporation, and

the whole argument of relator rests on an alleged distinction which the legislatures, and the courts of this country, must make in their treatment. We say, that so far as any matters now under consideration are concerned, they can and should be treated alike, and we use, in conclusion, the language of Mr. Justice Moore, who delivered the opinion of the Supreme Court of Michigan in deciding this case: "Though the decisions are not uniform, it may be considered as now settled, by the great weight of authority, that the use of a street railway company, under proper regulations, even though it use electricity as a motive power, is not an improper use of the street, and is not such an additional burden as to entitle the adjacent proprietor to additional compensation. It does not follow, however, from these decisions, that the electric car * * does not increase the danger to those who have a right to travel the streets. If it be asserted that the propulsion of a modern suburban car, forty-five or fifty feet long, which may be propelled at the will of the motor-man, at a speed from simply moving to forty or fifty miles an hour, through the public streets of a city, is not a different use of the street and a source of greater danger to the public, than obtained when the streets were used only by pedestrians and carriages drawn by horses, such an assertion would not commend itself to the common sense of those having cognizance of the facts. * * * New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run at frequent intervals, across a railroad over which trains are frequently run, it is a place of unusual danger, not only to the passengers

in the steam cars, but also to the passengers in the electric cars. This danger is occasioned not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that under such circumstances, the state, in the exercise of its police power, can take such steps as will minimize the danger and can impose the expense of doing so upon the corporations causing the danger."

In conclusion, we ask that our motion to dismiss be granted on the ground that no Federal question appears on the face of the record, or the judgment of the court below be affirmed on the ground that the principles to be exercised in the disposition of the case are so well settled that no further argument is needed.

Very respectfully,

HORACE M. OREN,
Attorney General of Michigan,
FRED A. MAYNARD,
Attorneys for Defendant in Error.

No. 139.

FILED
DEC 8 1902
JAMES H. McKENNEY,
Clerk.

Brf. of Oren & Maynard for D. C.

Supreme Court

Filed Dec. 8, 1902.

OF THE United States.

OCTOBER TERM, 1902.

No. 139.

THE DETROIT, FORT WAYNE and BELLE ISLE RAILWAY,

Plaintiff in Error,

vs.

CHASE S. OSBORN, Commissioner of Railroads,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

HORACE M. OREN,
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Plaintiff in Error,

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CHASE S. OSBORN, Commissioner of Railroads,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

On Clark Avenue, in the city of Detroit, Michigan, there is now and has been since 1881, a crossing caused by the intersection of tracks belonging to certain steam railroad companies and the tracks of Plaintiff in Error, a street railroad company. Ten years thereafter both corporations had double

tracks at this crossing, and, somewhat later, a third track for switching purposes was extended across the highway, at the point in question, by said railway companies. On these tracks at said crossing, in the year 1900, thirty-eight passenger trains passed each day, and on the street railway tracks electric cars passed every few minutes. Nineteen years after the first crossing was made, and nine years after the construction of double tracks by both corporations, the defendant in error, Commissioner of Railroads of the State of Michigan, was asked by the common council of the city of Detroit to order additional protection to said crossing, it having become a most dangerous one by reason of the great growth in population of the city of Detroit.

The defendant in error, on the 7th of March, 1902, acting under authority of an act passed by the legislature of the state of Michigan in the year 1893, entitled "An act to regulate the construction of the tracks of railroads and street railroads across each other, and the stringing of wires, electric or other, over railroad tracks, and relative to the maintenance of such tracks, heretofore so constructed, and wires heretofore so strung," did, after a personal inspection of the premises aforesaid, and after hearing representations of the city officials of the city of Detroit, and after giving notice to the Plaintiff in Error and the Union Terminal Association, the owner of the railroad tracks, and a hearing had, in which Plaintiff in Error participated, and after due deliberation, decide, that the public interest required such additional pratection at the crossing, and thereupon did order that there should be constructed, and thereafter operated and maintained, safety gates and de-

railing and signaling appliances, to be operated day and night by a watchman from a tower, and that the cost and expense of the construction, maintenance and operation of the said gates, tower and derailing and signaling appliances, should be born by the Union Terminal Association, and the Detroit, Fort Wayne and Belle Isle Railway Company, Plaintiff in Error, equally, share and share alike.

On April 2, 1900, Plaintiff in Error filed its petition in the Supreme Court of the State of Michigan, for the purpose of obtaining a writ of mandamus, and compel the vacation of the order aforesaid, in so far as it compelled it to share or bear any of the expense of constructing and maintaining the safety appliances mentioned in said order. After a most careful consideration, the Supreme Court of the State of Michigan refused to issue the writ prayed for, and maintained the order of the commissioner, and the statute on which it was based, as a legitimate exercise of the police power of the state. Thereafter, Plaintiff in Error sued out a writ of error and the case is now here for final determination.

ARGUMENT.

I.

THE RECORD IN THIS CASE PRESENTS NO FEDERAL QUESTION.

Since filing in this court our brief in support of this proposition, we have received the brief of Plaintiff in Error. After examination of same we are convinced that our position is right. To the authorities heretofore cited by us we add:

New Orleans Water Works Co. vs. State of Louisiana,

decided by this court last May, and reported in 185 U. S., page 356.

This case settles the principle that in order to warrant the exercise of jurisdiction by this court over the judgments of state courts there must be something more than a mere claim that a Federal question exists; there must, in addition to the simple setting up of the claim, be some color therefor, or in other words, the claim must be of such a character that its mere mention does not show it destitute of merit. There must be some fair ground for asserting its existence, and in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up.

After citing former decisions, this Court says:

> "These cases show the rule and its limitations, and where, by the record, it appears that although a claim of a Federal question has been plainly made, if it also clearly appear that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised was not sufficient to give this court jurisdiction."

It has been our claim from the beginning and is now, that an examination of the questions submitted by the Plaintiff in Error, in the light of these decisions, will show that there is no foundation for the claim that there are Federal questions in the case. The mere mention of them shows that they are destitute of merit.

The claim of Plaintiff in Error is this: The statute under consideration is silent as to notice. The order of the Railroad Commissioner as to how the costs of the construction and maintenance of the safety gates for the protection of the public

at the crossing in question shall be born, may be made without notice to the parties in interest and giving them an opportunity to be heard. For that reason the order of the Commissioner is void, and the statute itself unconstitutional. The Supreme Court of Michigan, having sustained both the order, and the statute based thereon, as a lawful exercise of the police power of the state, a Federal question is presented because such order and opinion deprives Plaintiff in Error of property without due process of law, contrary to the fourteenth amendment to the Constitution of the United States.

Plaintiff in Error cites authorities, and could have cited many more, to sustain the proposition that want of notice, in many cases, confers no jurisdiction, and, therefore, all subsequent proceedings are void, and a Federal question is raised where the state courts have sustained an act, and proceedings had thereunder, which results in a tax, assessment, servitude or other burden being imposed upon property for the public use, whether it be for the whole state, or of some more limited portion thereof, where no notice has been given to the persons whose property may be taken, and no opportunity is given them, *at any stage of the proceedings*, to contest the charge thus sought to be imposed.

But the entire claim of Plaintiff in Error is groundless, and the authorities cited have no application whatever to this case, for the simple reason that no tax, assessment, servitude or any burden whatsoever can be imposed on any property of Plaintiff in Error by any order that the Railroad Commissioner could make.

It has not been, and cannot at any time in the future, be

deprived of any of its property by the order made by the Commissioner in this case.

The Plaintiff in Error has the legal right to disobey, as it has, the order of the Commissioner. The only result of such disobedience is, that it becomes liable to pay a penalty as provided in Section 7 of said act, which reads as follows:

"It shall be the duty of every corporation and person to whom an order made by the Commissioner of Railroads under this Act shall be directed, to comply with such order in accordance with its terms, and for any neglect to so comply therewith any such corporation or person shall be liable to a penalty of one hundred dollars and to a like penalty for every ten days during which said neglect shall continue. Any such penalty may be recovered in an action of assumpsit brought in the name of the people of this State, and it shall be the duty of the prosecuting attorney of the proper county to bring any such action at the request of the Commissioner of Railroads."

In such action of assumpsit it is open to Plaintiff in Error to defend on any ground that it may see fit, and can there urge that the Commissioner had no jurisdiction to make the order, because the statute makes no provision as to notice.

Therefore, this case is ruled by the principle of law declared by this court in

Davidson vs. Board of Administrators of New Orleans, 96 U. S., p. 105.

"That whenever by the laws of a State, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of

the whole State, or of some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

The language of Mr. Justice Field, in declaring the opinion of this court in

Hagar vs. Reclamation Dist. No. 108, 111 U. S., 711,

applies with full force to this case. He says:

"This decision (Davidson vs. New Orleans) covers the case at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, and in them any defense going either to its validity or amount, could be pleaded.* * * Assessments in California, for the purpose of reclaiming overflowed and swamped lands, can be enforced only by suits, and, of course, to their validity it is essential that notice be given to the tax-payer, and opportunity be afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances. If property taken upon an assessment, which can only be enforced in this way, be not taken by due process of law, then, as said by Mr. Justice Miller, in the New Orleans case, these words, as used in the constitution, can have no definite meaning. The numerous decisions cited by counsel, some of which are given in the note, as to the necessity of notice, and of an opportunity of being heard, are all satisfied where a hearing in court is thus allowed."

That this rule is the settled law of the land is shown by

reference to the twelve pages of notes and citations to the leading case of Davidson vs. New Orleans, in Vol. 9 of Notes on United States Reports by Rose, pages 376-388.

The whole argument of counsel for Plaintiff in Error proceeds on an imaginary statement of facts to the effect that by the statute of Michigan the Railroad Commissioner is authorized without notice, and without any opportunity given for a hearing, at any stage of the proceedings, to arbitrarily impose the costs of the safety gates on Plaintiff in Error, and that the payment for the same shall be made within a certain number of days, and that the order shall be a lien on its property, which can be enforced by sale in default of payment, whereas the real facts are, that the Railroad Commissioner has no such power, and no property of Plaintiff in Error can be taken until it has had its day in court, and a full opportunity given it of making any defense it may have. Therefore, the claim that any Federal question exists in this record is so clearly without color of foundation, that the court is without jurisdiction in this case, and for that reason the writ of error should be dismissed.

II.

WAIVER OF NOTICE BY APPEARANCE.

"The object of notice being to give persons interested an opportunity to be present and protect their rights, it follows that a failure to give notice, or any irregularity in giving it, is waived, if the person entitled to notice appear and take part in the proceedings in the matter or matters concerning which they are required to be notified."

Lewis on Eminent Domain, Vol. 2, Sec. 379.

The author, in a note, cites sixty-five decisions in support of the above proposition, among which are the following Michigan cases:

East Saginaw & St. Clair R. R. Co. vs. Benham, 28 Mich., 459.

Dunning vs. Drain Commissioner, 44 Mich., 519.

Soller vs. Township of Brown, 67 Mich., 422.

The first two cases were decided by Judge Cooley. In delivering the opinion of the court he said:

In the first case, which involved proceedings to condemn land for the use of the railroad: "The want of publication of notice to owners and parties interested cannot be insisted upon on appeal, where all concerned have voluntarily appeared in the cause."

In the second case, which involved proceedings to lay out a township drain, he said:

"It appears from the return that plaintiff in *certiorari* had actual notice and took part in the proceedings before and at the time when the jury was struck. There is no reason to suppose he was taken by surprise in any of the proceedings. We are not inclined to reverse such proceedings, except for very substantial cause, and the present case, in our opinion, does not call for our intervention."

In the third case, proceedings were had to lay out a highway through the lands of the plaintiff in error. In this case it was decided that although the Commissioner's return of his proceedings failed to show that he met those interested at the place specified in his notice, it appearing, from the affidavit of

the plaintiff in error, that at the time and place specified in said notice, he and others did appear, in fact, and did meet the Commissioner for the purpose of being heard in opposition to the proceedings to establish such highway, he cannot complain of the omission in the commissioner's return.

Many other Michigan cases could be cited which follow the principle announced by the great judge above named, that want of notice can be waived by voluntary appearance.

There was such a voluntary appearance by plaintiff in error in this case. This fact affirmatively appears in its amended petition, page 14 of record, in which these words are found:

"Your petitioner respectfully shows that it has been served with a certified copy of an order made by Chase S. Osborn, Commissioner of Railroads of the State of Michigan, a copy of which order and certificate is hereto attached, and made a part of this petition, and marked 'Exhibit A'; *that notice was given by respondent to relator and the Union Terminal Association, and a hearing had, at which relator's representative objected to the making of said order.*"

Because of its voluntary appearance and taking part in the proceedings had, before the Commissioner, in response to a notice given it by him, plaintiff in error is not in a position to urge the point that the statute dees not require notice, admitting purely for the sake of argument that such notice is required.

III.

NO NOTICE IS REQUIRED IN PROCEEDINGS OF THIS CHARACTER.

Section 5 of the Act is the one complained of by counsel for plaintiff in error. It reads as follows:

"The Commissioner of Railroads shall, as soon as possible after the passage of this Act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incident thereto between the companies affected as he may deem just and reasonable."

They say that, by this section of the statute, the whole matter is left to the arbitrary action and independent investigation of the Railroad Commissioner, not only on the question of the necessity for the installation of safety devices, but also as to the distribution between the two companies of the cost of installing, maintaining and operating such safety appliances, and they advance the following proposition:

"It is the well settled law that where the public officer is given authority to determine that certain things should be done in the interest of public safety, and if the officer is given the further authority to impose the cost thereof upon certain individuals who are bound by his action, the matter is *quasi* judicial in its character, and if the law does not in express terms, or by necessary implication arising from the language of the Act itself, grant to the party against whom the judgment is rendered the right to a hearing before condemnation, such a proceeding and judgment amounts to a deprivation of property without due process of law within the meaning of the constitutional provision."

The direct and simple answer to this proposition is this: It has no application whatever to the facts of this case. The sole purpose of the Act, and of this particular section, is pro-

tection of life. It is the exercise by the legislature of a governmental power and duty, under the police power of the state, to secure a safe highway. In no such case can it be claimed, by railroad companies, and other corporations invested with the power of eminent domain, that they are deprived of property, without due process of law, by a statute, under which the result is ascertained in a mode suited to the nature of the case.

It is a simple elemental proposition that such corporations may be compelled to adopt such appliances and make such additions, or changes, in their works or property, and take such precautions as are necessary to the public safety.

The principle for which we contend in this division of our brief, is established by the decision of this court in

New York & New England R. R. Co. vs. Bristol,
151 U. S., 566,

to which we referred in our former brief. In this case Mr. Chief Justice Fuller refers to and adopts the reasoning of two Connecticut cases, in the following language:

"In Woodruff vs. Catlin, the court, speaking through Pardee, J., said in reference to a similar statute: 'The Act, in scope and purpose, concerns protection of life. Neither in intent nor in fact does it increase or diminish the assets either of the city or of the railroad corporations. It is the exercise of the governmental power and duty to secure a safe highway. The legislature having determined that the intersection of two railways, with a highway, in the City of Hartford, at grade is a nuisance dangerous to life, in the absence of action on the part either of the city or of the railroads, may compel them severally to become the owners of the right to lay out

new highways and new railways over such land and in such manner as will separate the grade of the railways from that of the highway at intersection; may compel them to use the right for the accomplishment of the desired end; may determine that the expense shall be paid by either corporation alone or in part by both; and may enforce obedience to its judgment. That the legislature of this state has the power to do all this, for the specified purpose, and to do it through the instrumentality of a commission, it is now only necessary to state, not to argue."

"And as to this Act, the court, in 58 Conn., 532, on this company's appeal, held that grade crossings were in the nature of nuisances which it was competent for the legislature to cause to be abated, and that it could, in its discretion, require any party responsible for the creation of the evil, in the discharge of what were in a sense governmental duties, to pay any part, or all, of the expense of such abatement."

The title of the case, reported in 58 Conn., *supra*, is the New York and New England Railroad Company's appeal from Railroad Commissioners. The counsel for the said company raised the same point that is raised by counsel for plaintiff in error in this case. The legislature of Connecticut had passed a law declaring that no matter what the facts and circumstances of a given case, the town should only bear one-fourth of the expense of making certain alterations in crossings when the public safety so required; the remaining three-fourths to be imposed upon the railroad company. Counsel for the railroad, in his brief, says:

"It is not due process of law to afford to parties a hearing before a proper tribunal, but to fetter this tribunal with an arbitrary rule forbidding it to apply the law of the land, or

any rules of distributive justice in the case these would affect one of the parties more than a certain extent. For this reason it is respectfully submitted, that the provisions of the Act of 1889 concerning the apportionment of expense in the class of cases to which the present one belongs, render the proceedings in this case unconstitutional and void, under both the constitution of this state, and the constitution of the United States."

The answer of the court to this objection, and its opinion, is as follows:

"The sole question in the case is, whether that portion of the act which limits the sum to be apportioned to the town to one-fourth of the whole expense is unconstitutional. This, it is claimed, is not due process, inasmuch as it may prohibit the commissioners from requiring of the town its just and fair proportion of the whole expense.

"If the legislature should require the division of joint property between two persons equally interested in such a manner as to give one three-fourths and the other but one-fourth, it would be indefensible, being against natural right, and not due process of law. So, too, of a statute that should attempt to compel one of two joint obligors, jointly and equally interested, to assume the whole obligation as between themselves. But the case before us is not a case in which the legislature is attempting to apportion joint property or a joint contract obligation between the parties, but is a case of curing an evil where both parties, in some measure, but in different degrees, are responsible for the evil. If two jointly commit a tort, whereby another is injured, the law will compel either party to pay the whole damage; and ordinarily no contribution is allowable. This case is somewhat analogous; but we do not place our decision on that ground. Two parties are engaged in legitimate business; both supply public wants, and

both, in some sense, discharge governmental duties. Both furnish ways to facilitate public travel. The way of each crosses that of the other at grade, and more or less danger unavoidedly attends their use. As the use increases, the danger increases. The policy of the state now is to abolish these grade crossings as rapidly as can be reasonably done. Legislation on this subject assumes that each party, in the discharge of its duty, is concerned in creating the danger, and that each may justly be required to contribute to the expense of its removal; or that either may be required to pay the whole; and if each contributes, that the proportion which each shall pay may be determined by the legislature, in each case as it arises, or by a general rule; by itself, or by a delegation of its power to the railroad commissioners. This exercise of power is justifiable on the ground that government itself, in the discharge of its governmental duties, undertakes to remove the danger; and does it in the same manner, and through the same instrumentalities, that it provides and maintains highways through and at the expense of towns and other corporations. So far as towns are concerned, it is a duty that has ever devolved upon them to keep the highways reasonably safe. They are compelled to act without compensation or pecuniary profit. Their sole motive is the public welfare. Railroad companies, in some sense, are but the agents of the government in affording to the public a more expeditious and vastly improved method of travel. As a compensation for their capital and labor invested they are permitted, as turnpike companies formerly were, to charge the public for the use of their ways. Unlike towns they do not act upon compulsion, but by choice. Their motive is a private gain; public benefit is incidental. Advantage to the public is a reason for granting the franchise; but the enterprise itself is essentially a private one. They contribute

largely to the danger, and the state may well require them to contribute largely to its removal. * * *

"We think it is competent for the statute to cause them to be abated, and that it may require any party responsible for their existence to pay any part or all of the expense. That being so, requiring the railroad company to pay three-fourths of the expense, however just it might be to require the town to pay more than one-fourth, is not a matter of which the railroad company can legally complain. The statute may operate harshly, as all statutes are liable to in certain cases, but it is not unconstitutional."

Counsel for plaintiff in error, on page 38 of their brief, say :

"Why the court did not consider the point (the statute not providing for notice) in the opinions filed, does not appear, but it is quite evident that it was overlooked."

Instead of casting this reflection on the Supreme Court of Michigan, it would be in accordance with all legal presumptions that the court paid no attention to the point because they regarded it, under the particular facts of this case, of no importance. We think that we have conclusively established that the whole argument of plaintiff in error, on the subject of notice, rests on no legal foundation when applied to the facts of this case.

IV.

On page 16 of their brief, counsel for plaintiff in error say:

"The legislature has not the power under the constitu-

tion to authorize the Railroad Commissioner to impose the cost of maintaining and operating safety devices and appliances upon the street railway company, under the facts and circumstances in this case, for the reason :

"1st. That it, in terms, imposes an additional burden and attaches an additional substantial condition to the right of the street railway to occupy the street and to operate its cars thereon.

"2nd. The attempt to fix upon the street railway company, which is simply a user of the highway in common with the general public, the cost of installing, maintaining and operating devices intended for the protection of the whole public using the highway, is an unjust discrimination, and is a denial of the equal protection of the law to the street railway company."

They cite no authority to support either of these propositions, and we are certain none can be found. But an examination of the record will disclose the fact that the question of user embraced therein was regarded by the court below, *as the question in the case*, and that one of its members, Mr. Justice Grant, did sustain counsel in their claim that no part of the necessary cost of the construction and maintenance of the safety gates could be legally imposed on plaintiff in error, for this reason:

"The street railway is a proper, legitimate and necessary use of the public highway. It is not an additional burden to that of the easement the general public has in the street. It is but one of many users of such highway, (therefore) it cannot be made subject to conditions other than those to which the general public is subject in traveling over such highways. Wherein (he asks) is the logic of compelling one user of the

public highway to pay the whole, or part of the expense, in protecting all users of the highway against the dangers incident to the passage of long, swift and ponderous trains of steam cars."

In a single word his argument is, "You can't legally impose a burden on a street railway company, which cannot lay its tracks in the streets of a city without first—and as a condition precedent thereto—having obtained the express permission of the proper authorities of said city, that you cannot lay on a private citizen, who happens to own a carriage, and has occasion to daily drive over this particular highway, or a grocer who uses heavy wagons in the conduct of his business.

The bare statement of the proposition contains its own refutation. And yet counsel for plaintiff in error not only seriously urge this as law, but insist that because the majority of the court rejected it, it results in such an unjust discrimination that their company is denied the equal protection of the law guaranteed by the constitution of the United States. And here again, they say, a Federal question is raised.

The simple and direct answer to the entire argument of both judge and counsel is this: While all private citizens can walk, ride or drive, at their free will and pleasure, over such highway, at any time and for any purpose, if a street railway corporation should attempt to so use the highway, without first having obtained the express consent of the proper public authorities, it would be a trespasser on such highway and could be proceeded against as such.

This is such an elementary proposition, and the distinc-

tion is so simple and so well defined, that it is useless to extend this argument by long citations from the authorities. (23 Am. & Eng. Encyc. of Law, page 946 and authorities there cited.)

The private citizen can use the highway without a license from the public authorities. The corporation that wishes to use the street to make money, for itself, by such use, must obtain such license. The price, in part, that it pays for the use of the street is the money that it may spend in the construction and maintenance of safety gates.

All private users simply pass and re-pass over the surface of the highway, but a street railway company takes possession of it. It lays its iron or steel rails in its soil. To all intents and purposes it owns the parts embraced within its tracks. All other users must give way to its cars. Its business is affected with the public interests, and is of such a character that it must be controlled by the public authorities, in so far as the public safety is endangered by its operation. It receives valuable franchises from the public, but written into every charter, every contract, every franchise, by force of law, is this principle: Every such charter, contract or franchise is granted or made by the public authorities, and received and entered into by the company with the express condition that it will always submit to, obey and carry out every police regulation which said public authorities shall then, or at any time in the future, deem necessary to protect the lives of the people and secure the safety of the public.

It is for this simple reason that when, by the growth of the city, or the erection of buildings at a certain point

therein, a crossing made by the tracks of street and railway corporations becomes dangerous, the public authorities have the right to so declare it; to order the construction of safety gates, and to impose the cost of their construction and maintenance upon the corporations which caused the danger in such proportion as they deem reasonable and just.

The whole question, then, as to whether a street railway company is or is not an additional servitude on the public highway, is absolutely immaterial and irrelevant to this case. The majority of the Michigan supreme court decided that it was not, the court using these words:

"Though the decisions are not uniform it may be considered as now settled by the great weight of authority that the use of a street by a street railway company, under proper regulations, even though it use electricity as a motive power, is not an improper use of the street, and is not such an additional burden as to entitle the adjacent proprietor to additional compensation."

But the court say: "It does not follow, however, from these decisions that the electric car does not increase the danger to those who have a right to travel the streets. If it be asserted that the propulsion of a modern suburban car, forty-five or fifty feet long, which may be propelled at the will of the motor-man, at a speed from simply moving to forty or fifty miles an hour, through the public streets of a city, is not a different use of the street and a source of greater danger to the public than obtained when the streets were used only by pedestrians and carriages drawn by horses, such an assertion would not commend itself to the common sense of those having cognizance of the facts. The long list of frightful injuries and fatal casualties which occur yearly because of the new methods of travel, in all our large cities, would be a complete answer to the assertion. Does it not follow, then, that though

the modern methods of travel are required by the conditions of modern life, that inasmuch as they may and do increase the danger to human life, that it is entirely competent for the state in its efforts to protect its citizens in the exercise of its police power to provide such regulations, at the expense of the persons or corporations employing the new methods, as in its wisdom it deems necessary to accomplish that purpose. It seems to us there can be but one answer to this question. New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that where electric cars run at frequent intervals, across a railroad over which trains are frequently run, that it is a place of unusual danger, not only to the passengers in the steam cars, but also to the passengers in the electric cars. This danger is occasioned not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that under such circumstances the State, in the exercise of its police power, can take such steps as will minimize the danger and can impose the expense of doing so upon the corporations causing the danger."

In no event does the question of additional servitude, upon which courts and judges have so divided, present a Federal question for the consideration of this court. If the question were here for discussion we certainly would take issue with counsel for plaintiff in error when they say their road is a street railway, pure and simple. We should insist that an examination of the various statutes of Michigan, under which plaintiff in error is organized and operated, the manner in which the defendant's road is constructed, the fact that it runs from the city into the country and its mode of use, as authorized by statute, makes it a commercial road rather than an ordinary street railway, and, therefore, it does become an additional servitude upon the public highway. That the rule of no additional servitude is restricted to the case where the

road, of the street railroad company is within the corporate limits of a city, and used solely for carrying passengers. We content ourselves with a simple reference to said statutes and certain decisions.

1. An Act to provide for the construction of tram railways, 1855. C. L. of 1897, page 2027.

2. Act 35, page 46, S. L. 1867. C. L. 1897, Vol. 2, page 2037.

3. C. L. of 1897, Sec. 13, page 2040, and Section 34, page 2041. In said last question these words are found:

> "They may do a suburban express business and may carry farm produce, garden truck, milk, merchandise and other like freight for twelve hours of each day without any restriction."

Taylor vs. Bay City Street Ry. Co., 80 Mich. 77.

Detroit City Ry. vs. Mills, 85 Mich. 634.

Nichols vs. Ry. Co., 87 Mich. 361.

Booth on Street Railway Law, §§54, 222 and 231.

Hannah vs. Street Ry. Co., 81 Mo., App. Rep., 78, (1899.)

Southern Ry. Co. vs. Atlanta Ry. & Power Co., 111 Ga., 679; (51 L. R. A., 125).

LaCrosse City Ry. Co. vs. Higbee, 51 L. R. A., 923.

V.

Counsel for plaintiff in error insist that the order of the Railroad Commissioner in terms imposes an additional burden and attaches an additional substantial condition to the right of the street railway to occupy the street, and to operate its cars thereon.

As counsel for plaintiff in error have cited no authority in support of this proposition, it seems entirely unnecessary to cite many authorities to show that this proposition is not true in law, and that this order of the Railroad Commissioner is a simple and just exercise of the police power of the state, delegated to him by the legislature. We content ourselves with a few quotations from a few text writers on the subject.

The subjection of existing corporations to new police regulations does not involve a repeal or amendment of the charters, for an act of incorporation simply guarantees to the incorporators the right to act and do business as a corporate body, subject of course to the laws of the land, and the legitimate control of government. Over the railway as a highway, and all its public relations, the state, by virtue of its legislative power has supervision and control."

Tiedman Lim. of Police Power, Sec's 179, 194.

"As applied to it, the police power is the continuing and paramount authority of the legislature, within its constitutional prerogatives, and of municipal corporations, under their delegated powers, to establish regulations which promote the public welfare and require it to do whatever is required for the health, safety and welfare of the people."

Booth's Street Railway Law, 220–226.

"Every special charter is granted and accepted, subject to such police regulations, as to the exercise of granted powers, as the legislature may establish. The whole subject matter is regulated by the legislature. The general police power of the state resides in the legislature. It can forbid grade crossings of highways by railroads or of one railroad by another at any particular place. It can, by the same authority, permit them at any particular place conditionally or unconditionally."

"The passing of an ordinance granting consent to an electric street railway to operate its cars upon the streets of the city does not divest the city of this power. It may so

regulate their use by such companies as may be most consistent with the safety of the general public from accidents and injury."

Joyce on Electric Law, Sec. 477.

See also Elliott's Roads and Streets, 2nd Ed. Sec. 459.

VI.

The last proposition which counsel for plaintiff in error make is stated, in different forms, in different parts of their brief, but the point is this: That the railroad seeking an intersection must make compensation for all damages and loss that may result therefrom. That where one railroad intersects another the former must make compensation, and likewise where a railroad is built over a highway, or where a highway is built over a railroad, that the junior road must pay all the expenses of putting the highway in a safe condition, and erecting and maintaining such safeguards as are required for the protection of travelers upon the street, or highway, as well as those who are traveling upon the steam cars. They claim that the *doctrine of priority of location* is well recognized in Michigan and other jurisdictions. According to this doctrine the junior railroad is responsible for the danger at the crossing at Clark Avenue, because before it was constructed there was no crossing and consequently no danger there.

The whole claim of counsel for plaintiff in error on this branch of the case can be reduced to this simple proposition: That the Union Terminal Association Railway Company must not only bear all of the expense of the construction of the

safety gates, but for all time thereafter must bear all of the expense of their maintenance because the first track of plaintiff in error was laid in Clark Avenue a year and a half before it was crossed by a single railroad track. Certainly no authority can be found to sustain such a proposition, when embraced in the statement of facts are added these facts: That at the time of the first crossing the territory was but sparsely settled and was in the suburbs of the City of Detroit; that nearly twenty years elapsed after such first crossing was made before the order was made, and that in the meantime, from a single track on which small cars were drawn by horses, the business of the street railway company had become so transformed that double tracks were laid and great cars, propelled by electricity, passed at the crossing every few moments of the day and night, and that the city had grown out to and embraced this point.

We said in the court below, and say now, that the Supreme Court of Michigan has never decided, nor any other court that we have any knowledge of, that where the necessity of safety appliances is created, some fifteen or twenty years after the crossing is first made, solely in consequence of changed circumstances and conditions, resulting from the growth of the surrounding territory, the road whose tracks were first laid shall be exempt from the burden of assisting in constructing, and forever exempt from the expense of maintaining safety appliances made necessary by such changed conditions.

The rule is settled in Michigan that for all injuries to its track, right of way, and franchise, occasioned by the crossing,

and which may be properly regarded *as the natural, necessary and approximate cause thereof*, the railroad whose track is crossed is entitled to receive damages, and whenever a jury at the time of the proposed crossing shall determine as a matter of fact that the erection and maintenance of gates, and the employment of flagmen *is an immediate necessity*—the necessity created at once and by the very fact of the construction of the crossing, then, and in such case, the expense thereof may also be considered by them as an element of damage. But the Supreme Court of that state has just as clearly stated that this in no wise "interferes with the police power conferred upon the Railroad Commissioner to interfere in behalf of the State, when such crossing shall become dangerous, by reason of the frequency of travel along the highway. "Contingent future disadvantages and the possibility that sometime in the future gates may be required for the safety of the public are never considered as elements of damage in proceedings to condemn lands for railway purposes, or in any of the questions which arise when crossings are made.

City of Grand Rapids vs. Bennett, 106 Mich., 528; and other Michigan cases cited therein.

Old Colony etc. R. R. Co. vs. Inhabitants of Plymouth Co., 14 Gray, 155;

Searle vs. R. R. Co., 33 Pa. St., 57;

Peoria etc. Co. vs. Peoria and Farmington Co., 105 Ills., 110.

Chicago etc. R. Co. vs. Joliet etc. R. Co., 105 Ills., 388.

Com'r of Parks & Boulevards vs. Mich. Cent. R. R. Co., 90 Mich., 385.

Com'r of Parks & Boulevards vs. The Chicago and Canada Grand Trunk R. R. Co., 91 Mich., 292.

F. & P. M. R. R. R. Co. vs. D. & B. C. R. R. Co., 64 Mich., 370.

People vs. D. G. R. & M. R. R. Co., 79 Mich., 474.

N. Y. & N. E. R. R. Co. vs. Bristol, 151 U. S., 556.

C. & N. W. Ry. Co. vs. Chicago, 140 Ills., 317.

Charlotte R. R. Co. vs. Gibbs, 142 U. S., 386.

Railroad Co. vs. St. Ry. Co., 89 Maine, 328.

Fitchburg R. R. Co. vs. Grand Junction Co., 4 Allen, 198.

Pittsburg R. R. vs. S. W. Pa. Ry. Co., 77 Pa. St. 173.

State vs. W., St. L. & Pac., 83 Mo., 144.

The decisions of this court in the cases just cited by us conclusively establish the right and the power of a state to pass such a statute as the one under review in this case. They hold that it is entirely competent for the legislature to require of corporations every reasonable and expedient change in the method of operating their roads and conducting their business, which may be necessary to promote the security, convenience and comfort of the public, and that the expense may be imposed on the corporations owning and operating such roads within the state. Such statutes are not in conflict with any provision of the Federal constitution. Being the recipient of special privileges from the state to be exercised in the interest of the

public, and voluntarily assuming the obligations thus mentioned, their business to the extent that it is affected with a public use is subject to legislative discretion, and in the discretion of the legislature all of this power may be exercised through a commissioner, or commissioners, specially appointed for that purpose.

We regard it as entirely unnecessary to longer continue this discussion. We insist that there are no Federal questions in this case. That there is no merit in any of the questions raised by counsel for plaintiff in error, and that the judgment of the court below, assuming the existence of Federal questions, should be affirmed, because said judgment was right and in exact accordance with the law of the land.

Very respectfully,

HORACE M. OREN,
Attorney General of Michigan,

FRED A. MAYNARD,
Attorneys for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 139.

THE DETROIT, FORT WAYNE AND BELLE ISLE RAILWAY, PLAINTIFF IN ERROR,

vs.

CHASE S. OSBORN, COMMISSIONER OF RAILROADS.

SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

HORACE M. OREN,
Attorney General of Michigan,
FRED. A. MAYNARD,
Counsel for Defendant in Error.

(18,232.)

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 1897

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Supreme Court of the United States.

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SUPPLEMENTAL BRIEF FOR DEFENDANT IN ERROR.

Since preparing our brief on the merits we have found numerous authorities that support the position taken by us.

But State of Louisiana *vs.* Canal & Claiborne Railroad Company, 50 La. Ann., 1189; L. R. A. Book 56, p. 287, is so similar in its legal principles that we feel warranted in referring to it at some length. It holds that an ordinance of the city council of the city of New Orleans which requires corporations operating street electric cars within the limits of the city, upon tracks laid down in the public streets thereof, to water their tracks so as to effectually lay the dust within

their tracks is a legal exercise of the police power of the city. Such an ordinance tends to promote the comfort and convenience of passengers and the health and comfort of the city. Counsel for the railroad company made the exact legal objections that are made by counsel of the railroad company in this case. They claimed that the ordinance was unreasonable, in that it laid the burden of the performance of a public duty upon a person or corporation making use of the street that was not laid upon all persons in like condition making use of the public highway; that it was unreasonable because unequal and not uniform; that it proposes and undertakes to add new conditions and to require the performance of new duties by a street railroad which has purchased the right by contract to operate its lines through the streets. Therefore it impairs the obligation of the contract and is violative of the Constitution of the United States and the constitution of the State of Louisiana. Also it deprives the citizen of his property and denies to the defendant corporation the equal protection of the law; that the performance of the duty required by the ordinance was burdensome and would cost a large sum of money annually.

The court sustains the position we take in this case that the State, in the exercise of its police power, may impose a burden upon a street railway corporation that it cannot upon a private citizen, for the reason that the latter can use the highway without a license from the public authorities, while the corporation that wishes to use the street to make money for itself must obtain such license. On this point the court says:

"The examples counsel gives of the right which the proprietor of a dray, the water cart, the omnibus, fur-

niture van, sugar wagon, cotton float, and pleasure vehicle has to the free use of the street for the purposes of his business are inappropriate, because neither exercises a franchise on the public streets of the city, but their use of the streets is just the same as that of any other private citizen. While each of said proprietors is licensed by the city to pursue his respective calling, his use of the streets is merely incidental thereto. But the street car company purchases from the city a public franchise or right to lay its tracks of steel fixedly and permanently in the center of the public highways of the city and to maintain same therein for a period of years, and to operate their cars thereon for the purpose of carrying passengers for hire. And it is disclosed by the evidence that the dust which occasions the inconvenience and discomfort of the passengers and the detriment to public health is directly and immediately referable to its use of that franchise; and it is that injurious use and enjoyment of its franchise which the aforesaid ordinance is intended to regulate."

In answer to the point raised by counsel that the large expense of watering their tracks would render this ordinance so burdensome as to seriously impair its franchise and render its revenues unremunerative, the court gives this answer:

"This exigency of defendant's franchise must be reasonably supposed to have been within the contemplation of the contracting parties when the franchise was secured and consequently an incident thereto."

The court then holds that this ordinance was valid as a simple exercise of the police power of the State. It says:

"The principles of law appertaining to the exercise of the police power of a State or municipal government have been so frequently enunciated by the courts of this State, and as

well as by those of other States and of the Supreme Court of the United States that the chief difficulty presented to the judicial mind consists in the selection to be made therefrom of those most suitable to the question under discussion."

The court holds on this point, as does every other court in this country, that the subjection of existing corporations to new police regulations does not involve a repeal or amendment of the charters, "for an act of incorporation simply guarantees the right to act and do business as a corporate body, subject, of course, to the laws of the land and the legitimate control of government and to such rules and regulations as may from time to time be ordained and established for the preservation of the safety, the health, and the morality of the people."

Without quoting, we refer the court to the following cases, which sustain our position that the legislation of Michigan and the order of the railroad commissioner based thereon, assailed by plaintiff in this case, is simply an exercise of the police power of the State and so clearly valid as to admit of no question whatever.

Pearsall *vs.* Great Northern Railway Co., 161 U. S., pp. 646–665.

Gladson *vs.* Minnesota, 166 U. S., pp. 427, 430.

Chicago and N. W. R'y Co. *vs.* City of Chicago, 29 N. E. Rep., pp. 1109–1111.

Chicago, Milwaukee & St. Paul R. R. Co. *vs.* City of Milwaukee, 97 Wis., p. 418.

Very respectfully,

HORACE M. OREN,
Attorney General of Michigan,
FRED. A. MAYNARD,
Attorneys for Defendant in Error.

Supreme Court of the United States.

No. 139.—October Term, 1902.

The Detroit, Fort Wayne and Belle Isle Railway, Plaintiff in Error,
vs.
Chase S. Osborn, Commissioner of Railroads.

In error to the Supreme Court of the State of Michigan.

[April 6, 1903.]

This case involves the legality of an order of the commissioner of railroads of the State of Michigan requiring the plaintiff in error and the Union Terminal Association of Detroit, at their own cost and expense, to maintain and operate safety gates and derailing and signalling appliances at Clark avenue in said city. The order is inserted in the margin.*

The order was made and issued under act 171 of the Public Acts of the State of 1873, section 5 of which provides as follows:

"The commissioner of railroads shall, as soon as possible after the passage of this act, examine the crossings of the tracks of railroads and street railroads then existing and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense incidental thereto between the companies affected as he may deem just and reasonable."

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*State of Michigan,
Office of the Commissioner of Railroads.

In re application of The Common Council of the City of Detroit for additional protection at the Clark avenue crossing of the tracks of the Union Terminal Association in the city of Detroit, county of Wayne, Michigan.

Application having been received by the commissioner of railroads from the common council of the city of Detroit, Wayne County, Michigan, for additional protection at the Clark avenue crossing of the tracks of the Union Terminal Association in said city of Detroit, Wayne County, Michigan;

And after a personal inspection of the premises aforesaid, and after hearing representations of the city officials of the city of Detroit, as well as the arguments of the representatives of the said railroad company above named in relation thereto, and having decided after due deliberation that the public interests required said additional protection at the said crossing;

Now, therefore, by authority vested in me by law, it is hereby ordered:

That within sixty days from date hereof, you, the said Union Terminal Association Railway Company, cause to be constructed and thereafter operated and maintained, safety gates, and derailing and signalling appliances to be operated day and night by a watchman from a tower. Said tower to be constructed at the best

The statute and order are attacked as depriving the plaintiff in error of its property without due process of law, because compliance with the order "will involve the expenditure of a large sum of money; first, in the construction of the said safety devices, and if the same are constructed, in the maintenance and repair thereof."

The plaintiff in error is a street railroad company incorporated under the laws of Michigan, and operates a railroad on certain streets of the city of Detroit, including Clark avenue. It succeeded in ownership and operation of a company known as the Fort Street and Elmwood Avenue Railway, which was also a street railway corporation. The latter company was authorized to construct its road on Clark avenue, and under its grant did construct and operate its road thereon. "At the time the track was constructed," (we quote from the opinion of the Supreme Court of the State,) "on Clark avenue there was no railroad, or highway, street, lane or alley or crossing of any kind over Clark avenue between Fort street and the River road. In 1882 or 1883 the Wabash railroad constructed a single track across Clark avenue and across petitioner's tracks. Up to that time there had been no crossing over Clark avenue between Fort street and the River road, of any kind, either that of a railroad or a public highway, a private way, road, street or alley. In the year 1893, or thereabouts, the union station was opened at the corner of Third and Fort streets in Detroit; and since that time said station has been used jointly by the Wabash, the Detroit, Lansing and Northern, the Flint, and Pere Marquette, the Detroit and Lima Northern, and the Canadian Pacific railroads as a terminal point, the tracks over Clark avenue at this point having been increased from one to three to accommodate the increased traffic. These tracks are used as approaches to the union station, and incoming and outgoing trains and cars of all the foregoing roads, except the C. P. R. R.,

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point of vision at the said crossing, and so constructed that the said operator may have plain view of movements of all trains or cars on both of the respective lines. Derailers shall be provided and placed in the tracks of the Fort Wayne and Belle Isle railway, not less than seventy-five feet from clearance point of crossing, and signals shall be placed on the tracks of the Union Terminal Association at a distance of not less than 600 feet from said crossing. Said derailers and signals to be operated by levers in said tower, and such levers to be properly interlocked.

And it is further ordered that cost and expense of the construction, maintenance and operation of said gates, tower and derailing and signalling appliance, shall be borne by the Union Terminal Association and the Fort Wayne and Belle Isle Railway Company, equally, share and share alike. This appliance to be constructed in accordance with plans to be submitted to and approved by the commissioner of railroads within thirty days from date hereof, and such appliance to be further approved by the commissioner of railroads before being put into use. This order is subject to modification at any time when in the opinion of the commissioner of railroads the public safety will be more effectually secured.

pass over said tracks. There are thirty-eight regular daily passenger trains crossing Clark avenue upon these tracks. Besides this, the Canadian Pacific uses the station as an eastern terminus, connecting with the other roads for purposes of through east and west traffic."

In 1891, the legislature of the State passed the act hereinbefore set out, and under its authority the defendant in error made the order complained of.

The case was submitted upon the petition of relator (plaintiff in error), and the answer of respondent (defendant in error), and the mandamus prayed for denied. (127 Mich. 219.) This writ of error was then sued out.

Mr. Justice McKenna delivered the opinion of the Court.

1. A motion is made to dismiss the writ of error on the ground that the record exhibits no Federal question. The motion is denied. The plaintiff claimed and set up a right under the Constitution of the United States, and the decision of the Supreme Court of the State was tantamount to the denial of that right. (*Kaukauna Co.* v. *Green Bay &c. Canal Co.*, 144 U. S. 254.)

2. The argument of plaintiff in error on the merits is that it was the first to occupy Clark avenue; that at that time there was no public highway or street crossing at such avenue; that subsequently the steam railroads laid their tracks, the Wabash Railway Company being the first to do so, but installed no safety devices of any kind, "though it were the junior company;" that the tracks on the other railroads were subsequently constructed and are controlled by the Union Terminal Company. It is hence asserted that the plaintiff in error cannot be made liable for any part of the cost of safety devices, because it is the settled constitutional law of Michigan that its occupation constituted no additional burden upon the highway, but is simply a method of using the highway for the purpose of public travel and "in direct furtherance of the purpose for which the highway was established, that the street railroad company in contemplation of the law bears no different relation to the highway than that of any other person using the highway for the moving of vehicles or for any other method of public or private travel, and cannot, as between others using the highway for like purposes, be required alone to bear the expense of installing and maintaining safety devices at steam railroad crossings designed for the protection of all the traveling public."

And further, it is also a well-established principle of the constitutional law of Michigan, that a junior road seeking to cross another cannot shift any portion of the expense of maintaining safety devices without compensation, though the senior company did not insist upon the installation of the devices or compensation at the time the tracks of the junior

company were constructed. In other words, it is asserted that the dangerous condition arose and yet arises from the steam railroads, and on them alone can the cost of safety devices be legally imposed.

3. It is also insisted that the law is unconstitutional because it does not provide for notice.

(1) It was conceded by the Supreme Court of the State that it was the law of the State that the compensation for the damages caused by crossing the tracks of a railroad by another railroad or by a highway included the cost of making the highway safe. But the court said: "An examination of these cases will show they were all cases where it was sought to obtain a right of way either for a railroad across a highway or for a highway across a railroad, or a crossing for one railroad over the right of way of another, and none of the cases relate to the question involved here as to who shall bear the expense of additional safeguards ordered upon roads which have crossed each other for a long period of time."

And besides this element of time, the court said that there were other elements of damage which were either too remote or depended upon the relation of the roads to the State. Both elements are important. The conditions which exist to-day could not have been contemplated years ago, or be the measure of the rights and relations of the respective roads. Those rights and relations were necessarily determined at the time the crossings were made. What could not be foreseen could not have been made a ground of action, and if the growth of business and population can give rights to either of the bisecting roads it is not clear how the police power of the State can be limited in its control over either of them. The Supreme Court of the State recognized this and fortified its views by Michigan cases.

In *The Flint & Pere Marquette R. R. Co. et al.*, (64 Mich. 350,) the court in an elaborate opinion expressed the rules of compensation when the right of one road to cross the tracks of another was sought by condemnation proceedings. In that case compensation was claimed not only for the use of the crossing, but for the cost of maintaining signals or a cross system, cost of a watchman, and cost of stopping trains. These items were rejected. There was some uncertainty in the evidence, and the items for maintaining signals or the crossing system were disallowed on that ground, but the court pointed out the difference between a "structural change in the property" for which compensation should be given, and those things which may be required by the legislature in the exercise of police regulations, as to which the roads "stand upon an equality before the law, and neither can levy tribute upon the other as a compensation for obedience to its requirements." And such regulations, it was observed, "are as binding upon an existing road as one newly organized." The court cited

the case of *Mass. Cent. R. R. Co.* v. *Boston, C. & F. R. R. Co.* (121 Mass. 124,) where Mr. Justice Gray, then Chief Justice of the Supreme Judicial Court of Massachusetts, expressed the law as follows:

"A railroad corporation across whose road another railroad or highway is laid out has the like right as all individuals or bodies politic and corporate owning land or easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface, absolutely required by law, or in fact necessary to be made by the corporation injured, in order to accommodate its own land to the new conditions. (*Com.* v. *Boston & M. R. R. Co.*, 3 Cush. 25, 53; *Old Colony Railroad Co.* v. *Plymouth*, 14 Gray, 155; *Grand Junction Railway Co.* v. *County Commissioners of Middlesex*, Id. 553.) But it is not entitled to damages for the interruption and inconvenience occasioned to its business; nor for the increased liability to damages from accidents; nor for increased expense for ringing the bell; nor for the risk of being ordered by the county commissioners, when in their judgment the safety and judgment may require it, to provide additional safeguards for travelers crossing its railroad. (*Proprietors of Locks and Canals* v. *Nashua & L. R. R. Co.*, 10 Cush. 385, 392; *Boston & W. Railway Co.* v. *Old Colony Railway Co.*, 12 Cush. 605, 611; *S. C.*, 3 Allen, 142, 146; *Old Colony Railway Co.* v. *Plymouth*, 14 Gray, 155.)"

It is however contended that a street railway has a different relation to a street than that which a steam railroad has; that the former "acquires a right to use the same in common with other members of the traveling public, and is not an additional burden upon the street, but is merely an adaptation of the highway to a particular means of travel, and does not constitute an additional servitude. A railroad is, on the other hand, an additional servitude, and if it is built across a highway, it must do all things necessary to render the highway, for all its legitimate uses, as safe as it was before the railroad was built across it, or would be, if such railroad were not built across it at all."

It may be that this difference is recognized as to abutting property owners or crossing railroads, but it cannot be recognized as limiting or affecting the power of the State to regulate the management of the roads in view of the danger of their operation to the public. Whether electricity be the motive power or steam be the motive power there is enough danger in the operation of either to justify regulation. The record in this case shows that there are thirty-eight daily passenger trains crossing Clark avenue, and that the cars of the plaintiff in error pass every few minutes. It is manifest, as the Supreme Court of the State observed, that the crossing "is a place of unusual danger, not only to the passengers in steam cars, but also to the passengers in the electric cars," and that the danger is caused by both. In such situation the city is surely not powerless to act, nor before acting must it ascertain the exact quantum of damage caused

by each road, and by that standard assign the cost of protecting the public. See *Railroad Co.* v. *Street R. R. Co.*, (89 Me. 328.)

It is also objected to the order that it deprives plaintiff in error of the equal protection of the laws. The argument to support this contention is an extension of that which claims that the use of the street by the plaintiff in error "is merely an adaptation of the highway to the particular means of travel." And it is deduced that an electric street railway has an equality of rights with ordinary vehicles. That we think there is a difference between ordinary vehicles and cars propelled by electricity which may be recognized by the State in the exercise of its police power we have sufficiently indicated.

(2) The objection that the statute does not provide for notice seems to be made for the first time in this court. It is not mentioned in the majority opinion nor in the dissenting opinion. It is not particularized in the petition for the writ of error nor in the assignment of errors. In the petition for this writ of error it is recited that the plaintiff in error in its application for mandamus claimed that the order of the railroad commissioners was invalid because it deprived plaintiff in error of its property without due process of law and denied it the equal protection of the laws. And also recited that on the "issue framed therein said cause went to a final hearing." The cause was submitted on petition and answer, and the petition alleged "that notice was given by respondent to relator and the Union Terminal Association, and the hearing had, at which relator's representative objected to the making of said order." It is therefore not open to the plaintiff in error to complain that the statute does not provide for notice.

Judgment affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

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